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4 N.N., et al.,  
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6 Plaintiffs,  
7

8 v.  
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10 MOUNTAIN VIEW-LOS ALTOS UNION  
11 HIGH SCHOOL DISTRICT,  
12

13 Defendant.  
14

15 Case No. 20-cv-08010-VKD  
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17 **ORDER RE IDEA APPEAL**  
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19 Re: Dkt. No. 55  
20

21 Plaintiffs N.N. and her mother T.T. filed this action against the Mountain View-Los Altos  
22 Union High School District (“District”) seeking judicial review of an administrative decision  
23 under the Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. §§ 1400, *et seq.*<sup>1</sup>.  
24 Plaintiffs contend that the District failed to identify N.N. as a student eligible for special education  
25 services in her sophomore year in high school, leading to her enrollment in an out-of-state private  
26 residential program where she attended the local public high school for her junior and senior years.  
27 Plaintiffs claim that the District denied N.N. a free appropriate public education (“FAPE”) for  
28 each of the three school years at issue, 2017-2018, 2018-2019, and 2019-2020. They seek  
reimbursement of expenses related to her private placement and other services, as well as their  
attorneys’ fees and costs.

An administrative law judge (“ALJ”) issued a decision in favor of the District. In their present appeal, plaintiffs seek *de novo* review, arguing that the ALJ erred in several key respects.

<sup>1</sup> Plaintiffs also assert claims for violation of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §§ 749, *et seq.*, and for violation of Title II of the Americans with Disabilities Act, 42 U.S.C. §§ 12132, *et seq.* Those claims are not before the Court on the present briefing regarding plaintiffs’ IDEA appeal.

1       The matter is fully briefed. Dkt. Nos. 55, 56, 59, 61. Upon consideration of the moving  
2 and responding papers,<sup>2</sup> the oral arguments presented, and the record evidence,<sup>3</sup> the Court reverses  
3 the ALJ's decision in part and affirms it in part, and orders further briefing re plaintiffs' request  
4 for reimbursement of costs and for reasonable attorneys' fees and expenses.<sup>4</sup>

5 **I. BACKGROUND**

6       During the 2016-2017 school year, N.N. was enrolled as a freshman at Los Altos High  
7 School ("LAHS") within the District. Although she appeared to transition well to high school, in  
8 May 2017, at the end of her freshman year, N.N. told T.T. that she had been struggling with  
9 depression and feelings of wanting to hurt herself. After T.T. reached out to Galen Rosenberg, the  
10 vice principal assigned to N.N., Mr. Rosenberg notified N.N.'s teachers in a May 23, 2017 email  
11 that N.N. "has been going through a very difficult and emotional period recently. She has reached  
12 out to her family and to us for support." AR<sup>5</sup> 277. Mr. Rosenberg further noted, "We have  
13 referred her to supports available here and outside of LAHS." *Id.* Around June 2017, N.N. began  
14 seeing Dr. Kapoor, a private therapist paid for by T.T. and insurance. AR 1795:4-10, 22-25;  
15 1796:1-2. N.N. saw Dr. Kapoor at least once per week until around mid-May 2018. AR 1796:5-  
16 12; 1797:5-9; 2451:25-2452:5; 2506:8-14.

17 **A. 2017-2018 School Year**

18       **1. N.N.'s educational experience**

19       When she began her sophomore year (2017-2018) at LAHS, N.N. continued to struggle  
20 with symptoms of anxiety and depression. During the first quarter, N.N.'s grades reflected her

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22       <sup>2</sup> Both sides ask the Court to consider certain administrative decisions. While the Court is not  
23 persuaded that judicial notice under Federal Rule of Evidence 201 is the proper mechanism for the  
24 review of those materials, the Court has considered the decisions cited by the parties. However,  
25 the Court does not take judicial notice of any particular fact or legal conclusion in those decisions.

26       <sup>3</sup> In addition to the administrative record, the Court has also considered the testimony given during  
27 the July 16, 2021 evidentiary hearing. *See* Dkt. Nos. 48, 57.

28       <sup>4</sup> All parties have expressly consented that all proceedings in this matter may be heard and finally  
29 adjudicated by a magistrate judge. 28 U.S.C. § 636(c); Fed. R. Civ. P. 73; Dkt. Nos. 10, 17.

<sup>5</sup> "AR" refers to the administrative record plaintiffs lodged with the Court under seal. *See* Dkt.  
30 Nos. 31, 35, 51.

1 poor academic performance: a B+ in chemistry, a D in algebra II, a D- in AP human geography, a  
2 C in Spanish and an F in an honors world literature course. AR 482. T.T. testified that Dr.  
3 Kapoor recommended that she reach out to LAHS for assistance. AR 1798:4-6.

4 On October 5, 2017, T.T. contacted Mr. Rosenberg for help, stating that N.N. “is feeling  
5 extremely overwhelm [sic] with the transition of 9th grade to 10th grade. She has stressed to her  
6 therapist and tutor this feeling of not being able to catch up or enough time because of a lot of  
7 homework.” AR 277, 1797:10-23. Mr. Rosenberg offered to meet with T.T. to discuss N.N.’s  
8 “status at Los Altos and consider what kinds of changes would be in her interest.” AR 276. He  
9 met with T.T. on October 18, 2017 and discussed ways to alleviate the stress of N.N.’s homework  
10 and classes and the possibility of developing a 504 accommodations plan.<sup>6</sup> AR 1798:7-24.

11 On October 26, 2017, T.T. emailed Mr. Rosenberg, attaching a note from N.N.’s  
12 pediatrician, who diagnosed N.N. with anxiety and noted that “this medical diagnosis is significant  
13 enough that it might require special accommodations in her educational program.” AR 275-76;  
14 279; 1804:21-24. Mr. Rosenberg was out of the office at that time; and when T.T. called the  
15 school to follow up on her email, she was connected to Nicolas Betancur, LAHS’s school  
16 psychologist. AR 1806:23-1807:11. Mr. Betancur testified that he discussed special education  
17 with T.T. at that time, noting that he suggested that T.T. “start with the 504 plan but to be aware  
18 that special ed[ucation] support may be necessary down the road”; and that T.T. “should be in  
19 touch with [Mr. Rosenberg] to first problem solve the 504 [plan] and inquire about a special  
20 ed[ucation] eval[uation] if more is needed.” AR 994; 2122:22-2123:17. Mr. Betancur did not  
21 provide T.T. with a copy of the IDEA procedural safeguards. AR 2124:14-16.

22 On November 15, 2017, the District convened a meeting and developed a 504 plan for  
23 N.N. AR 281. Mr. Rosenberg testified that the District’s normal procedure was to provide  
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25 <sup>6</sup> A 504 plan refers to a document created pursuant to the federal anti-discrimination law  
26 commonly referred to as Section 504 of the Rehabilitation Act of 1973. “While the IDEA focuses  
27 on the provision of appropriate public education to children with disabilities, the Rehabilitation  
28 Act more broadly addresses the provision of state services to individuals with disabilities. . . . The  
FAPE requirements in the IDEA and in Section 504 are overlapping but different.” *McIntyre v.  
Eugene School District 4J*, 976 F.3d 902, 911 (9th Cir. 2020) (internal quotations and citation  
omitted).

1 parents receiving a 504 plan with documentation, including a brochure “that describes what  
2 eligibility means, what 504 plans are, what IDEA is, what special education services are.”  
3 AR 1225:7-10. T.T. received a package of information from LAHS regarding N.N.’s 504 plan,  
4 including brochures on outside services and programs. AR 1809:1-11. She testified that she had  
5 reviewed so many different documents at that time, she does not recall whether the package  
6 included a document with information about IDEA procedural safeguards. AR 1809:19-23. T.T.  
7 further testified that at that time, no one from the District explained to her that she had a right to  
8 contest the District’s 504 plan or informed her that she had a right to request a special education  
9 assessment. AR 1809:24-1810:1, 15-20.

10 The District’s 504 plan identified N.N.’s disability as “[a]nxiety” and noted that “[a]nxiety  
11 limits learning.” AR 281. N.N.’s 504 plan included three accommodations: “extensions on  
12 assignments that are arranged with the teacher”; “extra time on tests up to 1.5” and the ability to  
13 “test in a separate space” with details to be arranged with each teacher; and monthly meetings  
14 between N.N. and each of her teachers. *Id.* Additionally, in consultation with T.T., it was agreed  
15 that N.N. would drop the honors world literature class and would enroll in a regular world  
16 literature course the following semester. AR 968; 1056; 1232:12-16; 1815:16-22. Mr. Rosenberg  
17 testified that at the time of the 504 plan meeting, he felt a 504 plan was appropriate for N.N.  
18 AR 1224:11-22. Noting that N.N. is not the only student with this set of challenges, Mr.  
19 Rosenberg testified that the typical process for students diagnosed with anxiety that appeared to be  
20 affecting their schoolwork was to first create a 504 plan. AR 1224:14-22.

21 N.N. ended the first semester of her sophomore year with a C- in chemistry, Ds in algebra  
22 II, AP human geography and Spanish, and no grade in the honors word literature course that was  
23 dropped. AR 482.

24 During the second semester, in February 2018, N.N.’s teachers emailed one another and  
25 Mr. Betancur regarding their concerns about her academic performance. Florence Wu, N.N.’s  
26 algebra teacher, remarked, “I have been worrying about her and her low grades thus far for 2nd  
27 semester. Towards the end of 1st semester after we had all met, I observed that she had renewed  
28 focus and had made some marked improvement.” AR 968. However, Ms. Wu noted that with the

1 start of the second semester, “[N.N.] appears to have reverted.” *Id.* While Ms. Wu observed that  
2 N.N. appeared to be “happy and very social in class,” she reported N.N. also was “not engaged in  
3 the lesson at all” and Ms. Wu “regularly need[ed] to ask her to pay attention and to stop being off-  
4 task with her table mates[.]” AR 999. Ms. Wu noted that N.N. asked to leave the room to get a  
5 drink of water or go to the restroom and usually returned within 5-10 minutes. *Id.* On one  
6 occasion, however, N.N. and another classmate left the room at around the same time and did not  
7 return for over 15 minutes. Ms. Wu did not know where they were during that time and told them  
8 that they were not to do that again. *Id.* Academically, Ms. Wu reported that N.N. was “essentially  
9 bombing all [of Ms. Wu’s] assessments,” had “not taken advantage of opportunities for  
10 corrections or retake exams,” did not come to any of Ms. Wu’s tutorial sessions or after-school  
11 sessions for extra help, and seemed to “hide her lack of understanding rather than face it.”  
12 AR 999-1000.

13 Trina Mattson, N.N.’s chemistry teacher, stated that although N.N. “did fine” during the  
14 first semester, “currently she is failing, not turning many assignments in, and missing class a lot  
15 1st period due to her appointments.” AR 968. During the 2017-2018 school year, N.N. missed 28  
16 periods of chemistry and was tardy 16 times. AR 480, 1344:9-16. Ms. Mattson understood from  
17 T.T. that N.N. was missing classes due to medical appointments. AR 1344:24-1345:3. Ms.  
18 Mattson testified that N.N.’s absences mostly impacted N.N.’s lab grades, as chemistry lab work  
19 required students to be present in class. AR 1345:13-17. Ms. Mattson did not believe that N.N.’s  
20 absences impacted her overall learning in chemistry because N.N. had generally been getting B  
21 grades on tests and quizzes. However, Ms. Mattson noted that N.N.’s performance on tests and  
22 quizzes had declined during the second semester compared to the first semester. AR 1344:17-  
23 1346:2; 1347:18-25.

24 Kelly Coble, N.N.’s human geography teacher, observed that N.N. “seems to be happier in  
25 class—she likes the group she sits with and seems genuinely interested in the material and class  
26 activities.” AR 969. However, Ms. Coble noted that “very little (well nothing) seems to be  
27 getting done at home making it difficult for her to be successful on the tests” and stated that N.N.  
28 “hasn’t taken advantage of the opportunities for corrections/resubmissions.” *Id.* Ms. Coble

1 further noted that N.N. “has asked to go for a walk several times when she is stressed, which  
2 shows that she is at least somewhat advocating for herself, but in terms of her overall grade, those  
3 efforts aren’t showing up.” *Id.*

4 Antonio Murillo, N.N.’s Spanish teacher, shared that N.N. had been leaving class for at  
5 least part of the period almost daily. He “felt that there was something emotional going on” with  
6 N.N. “that at least one of her classmates was aware of.” AR 998.

7 Jasmine Mark taught the regular world literature course that N.N. enrolled in for the  
8 second semester of the 2017-2018 school year. Ms. Mark noted that, due to the relatively short  
9 period of time N.N. had been in her class, it was difficult to assess her progress. Ms. Mark  
10 observed that N.N. “definitely engages with classmates” and had “a number of friends” in the  
11 class. AR 999. For the most part, N.N. appeared to be “very focused and prepared,” although Ms.  
12 Mark noted that N.N. did not complete her first major assignment and did not communicate with  
13 Ms. Mark about it beforehand. *Id.* Ms. Mark commented that “the biggest problem with  
14 attendance is [N.N.] leaving class for long stretches of time to walk around/calm down[.]”  
15 AR 967; 999. Ms. Mark did not know where N.N. was going during these breaks. On one  
16 occasion, N.N. left class for over 30 minutes and seemed to understand when Ms. Mark told her  
17 that was unacceptable. AR 999; 1314:25-1315:1-14.

18 In following up on N.N.’s situation, Mr. Betancur reported to Mr. Rosenberg in February  
19 2018 that “[t]here’s a good explanation for the drop in grades and increased absences as of late  
20 that won’t be a surprise to [T.T.]” AR 997. Mr. Betancur later testified that he was referring to  
21 mental health issues that N.N. had been experiencing. AR 2114:10-16. Given that N.N. had two  
22 free periods at that time, Mr. Betancur told Mr. Rosenberg that he “prefer[red] to structure her  
23 time a bit more . . . and have someone able to keep tabs on her,” and suggested placing N.N. in a  
24 supervised study class “to see what effect that has.” AR 997. He further noted that the school  
25 would then “have that information available to us in case we proceed with a formal eval[uation]  
26 down the road,” meaning a special education assessment. AR 997, 2116:14-21. The supervised  
27 study class, however, was at capacity, with other students ahead of N.N. to join the class. AR 997.  
28 Mr. Betancur testified that he did not refer N.N. for a special education assessment at that time “in

1 the spirit of trying to be least restrictive as possible,” and because that decision would have to be  
2 made at a team meeting rather than unilaterally by him. AR 2116:22-2117:3.

3 By this time, N.N. was vaping nicotine, smoking cannabis, and drinking alcohol.  
4 AR 1465:6-11. T.T. testified that she did not see N.N. drinking alcohol. However, sometime  
5 between December 2017 and February 2018, T.T. observed social media posts showing N.N.  
6 vaping in class and smoking with friends in the restroom at school. AR 1812:4-14. She reached  
7 out to Mr. Rosenberg to bring the matter to his attention and to see what could be done to help  
8 N.N. academically because the 504 plan was not helping her. AR 1812:18-1813:2.

9 On March 8, 2018, T.T. met with Mr. Rosenberg and Mr. Betancur. T.T. informed them  
10 that she enrolled N.N. in the Children’s Health Council (“CHC”) intensive outpatient treatment  
11 program (“IOP”). AR 967; 1824:16-19; 2120:14-15. Mr. Rosenberg had suggested moving N.N.  
12 to a continuation school within the District, where other LAHS students had gone to recover  
13 school credits. AR 2119:22-25; 2122:4-8. Mr. Betancur recalled that T.T. “seemed amenable to  
14 the idea” as a way to “reset from pressures and stress that [N.N.] was feeling at [LAHS].”  
15 AR 2120:10-14. However, when T.T. mentioned the continuation school to N.N., N.N. did not  
16 want to be sent there because she believed that was “where they send all the bad kids” and N.N.  
17 felt she was “not a bad kid” and “just needed help.” AR 1823:17-21. T.T. told N.N. that her  
18 options were either to go to the continuation school or to enter the CHC IOP. N.N. chose the IOP,  
19 and T.T. followed up with Mr. Rosenberg and asked him to hold off on sending N.N. to the  
20 continuation school while they tried the IOP first. AR 1824:2-15.

21 By the end of the third quarter of her sophomore year, N.N. had Fs in chemistry and Spanish, a  
22 D in AP human geography and a D- in algebra II. AR 482. In early March 2018, N.N. dropped her  
23 second world literature course, and received “No Mark” for that class, but her teacher Ms. Mark  
24 testified that N.N. probably would have received an F, as she had not completed a major assignment.  
25 AR 972; 1313:11-14.

## 26           **2. Children’s Health Council Intensive Outpatient Program**

27 On March 12, 2018, N.N. began the CHC IOP. During the intake procedure, N.N. reported  
28 depressed mood, feelings of extreme hopelessness, and low motivation and energy. AR 283. She

had withdrawn from social interactions and noted a loss of pleasure in previously enjoyable activities, such as tennis and basketball. CHC noted that N.N. “was also failing academically and reported both somatic complaints and lack of interest/motivation as interfering with attending class and completing work.” *Id.* Additionally, N.N. “expressed periods of extreme worry” that impacted her performance in school and outside of school and “increased her avoidance of non-preferred activities and conversations.” *Id.* N.N. reported a strained relationship with T.T. and endorsed suicidal urges of moderate intensity at least three to four times per week. AR 283-84. While she had no current suicidal plan, N.N. noted that during a previous period her suicidal urges occurred four to five times per week and at times included a plan to walk in front of a train near her home. AR 283. N.N. stated that her suicidal urges increased after conflicts with her mother and during times of higher anxiety. *Id.* N.N. also reported a history of substance use, some of which was a means of coping with her symptoms of depression and anxiety. *Id.* Upon her entry in the IOP, N.N. reported cannabis use one to two times per week, as well as experimentation with nicotine, Xanax, and alcohol. *Id.*

CHC determined that N.N. met the diagnostic criteria for Major Depressive Disorder, Recurrent, Severe without psychotic features, and Generalized Anxiety Disorder. AR 284. While N.N. made some improvement in her ability and willingness to communicate with T.T., her progress in the IOP otherwise was minimal. She did not engage in the program and rarely practiced skills, tended to blame others for her problems, and had difficulty accepting responsibility for her own challenges. *Id.* Jennifer Leydecker, N.N.’s CHC therapist, observed that N.N.’s “mentality was if I just get away from my mom—I—my stress would be gone because she has these expectations for me that I don’t want.” AR 1428:24-1429:1.

N.N. continued to use substances outside the CHC program, and on one occasion, she came to CHC under the influence of Xanax. AR 284; 1429:5-13. She also continued to experience symptoms of anxiety and depression, and to have difficulty following rules at home and staying on task at school. AR 284. N.N. reported a desire to run away from home during conflicts with T.T. *Id.* In April 2018, N.N. left home without permission in an attempt to attend the 420 festival (a cannabis-related event) in San Francisco. T.T. and the police found N.N. using

1 the GPS tracker on N.N.’s cell phone. AR 284; 1826:22-1828:18.

2 Due to her limited progress and engagement in the program, N.N. was discharged from the  
3 IOP after about seven weeks on April 30, 2018. AR 283-85; 1429:5-13. CHC recommended that  
4 N.N. participate in a therapeutic wilderness program, with the possible need for subsequent  
5 residential treatment placement. AR 285. Ms. Leydecker testified that in terms of N.N.’s risk  
6 factors and areas for ongoing support (namely, her history of suicidality and substance use), “as  
7 N.N. moved through IOP, she had a period where she wasn’t endorsing suicidal ideation. And  
8 then once we dug deeper, it was really about the idea of not being able to leave the house and  
9 really being stuck with [T.T.]” AR 284; 1431:15-19. At that time, CHC did not recommend  
10 placement in a substance abuse treatment program because they felt that “the behaviors associated  
11 with [N.N.’s] . . . depression and her anxiety . . . needed to be addressed and for her to actually  
12 build really effective coping strategies and communication strategies.” AR 1432:9-17. Ms.  
13 Leydecker believed that N.N. needed a wilderness program to gain a stronger set of skills to  
14 support all areas of functioning, including her education. AR 1433:18-1434:14.

15 CHC referred T.T. to an educational consultant, who in turn referred T.T. to the Second  
16 Nature Wilderness program (“Second Nature”), as well as to a special education attorney.  
17 AR 1432:20-24; 2429:10-18. T.T. testified that it was at this time, at the end of April 2018 or  
18 beginning of May 2018, that she learned for the first time that she had the right to request a special  
19 education assessment from the District. AR 2428:2-9; 2429:4-7.

### 20           **3.       T.T.’s May 1, 2018 Request for a Special Education Assessment**

21 On May 1, 2018 at 9:26 p.m., T.T. emailed Frances English, the District’s then Director of  
22 Special Education, requesting an assessment to determine whether N.N. was eligible for special  
23 education services. T.T.’s special education attorney was copied on that email.<sup>7</sup> AR 287;  
24 2427:24-2428:12. Ms. English responded less than 20 minutes later, stating that T.T. would  
25 “receive an assessment plan within 15 days.” AR 963. On May 18, 2018, Ms. English sent an  
26 email to T.T. confirming that the District “mailed [N.N.]’s assessment plan this week” and  
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28 <sup>7</sup> Plaintiffs previously were represented by a different attorney than their current counsel.

1 offering to evaluate N.N. in June. AR 963; 2432:18-22. By May 15, 2018, however, T.T. had  
2 enrolled N.N. in the Second Nature program in Utah. On May 17, 2018, N.N. left California to  
3 participate in that program. AR 289; 295; 2434:16-23.

4 As of the end of the 2017-18 school year, N.N. received a D in algebra II, a D- in human  
5 geography, and an “I” for “incomplete” in her chemistry and Spanish classes. AR 297; 482;  
6 1375:8-11.

7 **B. Second Nature Wilderness Program**

8 Dr. Coady Schueler, N.N.’s Second Nature treating psychologist, describes Second Nature  
9 as “a licensed adolescent treatment program that utilizes the experiential opportunities of a  
10 wilderness setting with a clinically focused intervention.” AR 313. At Second Nature, N.N. “took  
11 part in the therapeutic milieu as well as individual and group therapy,” and individual weekly  
12 psychotherapy and family intervention with Dr. Schueler. *Id.* Dr. Schueler noted that although  
13 N.N. initially presented as “angry and resentful” and experienced frequent periods of extreme  
14 anxiety requiring considerable management by Dr. Schueler and program staff, N.N. “became  
15 more engaged during the course of treatment” and “displayed significant progress in her ability to  
16 self-regulate periods of anxiety and of emotional reactivity.” *Id.* Additionally, Dr. Schueler noted  
17 N.N.’s progress at Second Nature regarding depression, defiant behavior, substance abuse, and the  
18 parent-child relationship, and reported that N.N. “enjoyed the relative stability of the wilderness  
19 setting as a chance to stabilize and experience some success.” AR 314-15. While at Second  
20 Nature, N.N. earned school credits in English, biology, physical education, and psychology.<sup>8</sup>  
21 AR 1025; 2445:25-2446:5.

22 **C. Erica Starks’s Assessment**

23 Meanwhile, the District continued to work with T.T. on an assessment plan. AR 962-63.  
24 On June 14, 2018, the District emailed to T.T. an assessment plan, along with a notice of  
25 procedural safeguards and other documentation. AR 301. T.T. signed the assessment plan that  
26 same day and returned it to the District. AR 299; 301; 305. Among other things, the plan

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27  
28 <sup>8</sup> The parties have not cited, and the Court has not found, evidence indicating what educational services, if any, N.N. received while she was at Second Nature.

1 contemplated an academic achievement evaluation by an education specialist. AR 299.

2 In July 2018, the District sent Erica Starks, an LAHS special education teacher and  
3 department coordinator, to Utah to conduct the academic portion of N.N.'s assessment.  
4 AR 2136:25-2137:4. Ms. Starks has a master's degree in special education, a "mild-to-moderate"  
5 special education credential, as well as an authorization in autism and a certification in cross-  
6 cultural language academic development. She has worked for LAHS since 2005. Prior to her  
7 employment with LAHS, she also served as a teacher and as an education specialist/coordinator at  
8 other middle and high schools. She testified that over the course of her career, she has conducted  
9 around 300 academic assessments. AR 2134:1-2136:24.

10 Ms. Starks assessed N.N. on July 17, 2018. AR 307. At the time of her assessment, Ms.  
11 Starks did not know why N.N. was at the Second Nature program, but she knew that the District  
12 was considering the specific learning disability, emotional disturbance, and other health  
13 impairment eligibility categories with respect to N.N.'s assessment. AR 2137:11-16; 2139:17-19.  
14 Ms. Starks rented a four-wheel drive Jeep and drove to the Second Nature campsite. AR 307;  
15 2143:4-7. Due to the wilderness setting, Ms. Starks made modifications to standardized testing  
16 procedures. She and N.N. worked away from the main camp group, sitting on camping chairs  
17 without a table. AR 307. During testing, there were three sudden thunder showers and one hail  
18 storm, each lasting about 10-15 minutes. Ms. Starks and N.N. continued with the testing in Ms.  
19 Starks's vehicle, with Ms. Starks in the front seat and N.N. in the backseat. *Id.* Ms. Starks noted  
20 that N.N. "had good concentration despite the multiple distractions in the testing window." *Id.*

21 Ms. Starks observed that N.N. "had an advanced level of conversational proficiency" and  
22 "appeared at ease, comfortable and self-confident compared to others her age and grade level."  
23 AR 307-08. Ms. Starks further described N.N. as "easy going" and "exceptionally cooperative"  
24 during the examination. AR 307. N.N.'s activity level was noted to be "typical for her age and  
25 grade"; N.N. did not appear to be listless or overactive; and Ms. Starks reported that N.N. "was  
26 attentive and was able to concentrate on the task at hand." *Id.*

27 Ms. Starks administered a set of tests from the Woodcock Johnson IV Test of  
28

1 Achievement.<sup>9</sup> AR 309, 2141:17-18. She remarked that N.N.’s scores on the first two subtests for  
2 letter-word recognition and passage comprehension may be lower than her abilities. AR 309;  
3 2144:2-12. Due to the unusual nature of the testing environment in a wilderness setting and the  
4 fact that N.N. had been away from academic demands for about two months, Ms. Starks noted that  
5 N.N. “was slow to warm to the testing session,” but “her comfort with the testing session  
6 increased within a couple of subtests.” AR 307; 309. By the third subtest, Ms. Starks observed  
7 that N.N. “appeared to have more focus and to be sharper.” AR 309; 2143:19-2144:13.

8 N.N.’s performance showed broad academic achievement in the average range. AR 309;  
9 311; 2147:2-11. Ms. Starks testified that N.N.’s strengths are written expression, math  
10 calculation, math problem solving, broad written language, broad writing skills, and academic  
11 fluency (i.e., how quickly she can do something). AR 2147:2-7. In particular, Ms. Starks did not  
12 find N.N.’s performance indicative of a math disability. AR 309; 2147:8-11. N.N.’s lowest scores  
13 (in the “limited” range) were in reading comprehension; Ms. Starks also noted that N.N. said she  
14 did not enjoy reading and that it is a struggle for her. AR 310; 311; 2147:12-15. Ms. Starks did  
15 not believe that N.N.’s reading comprehension scores, in and of themselves, indicated a learning  
16 disability; rather those scores were “one piece” to be considered in N.N.’s assessment.  
17 AR 2147:16-22. Ms. Starks suggested that N.N. could improve her reading comprehension  
18 through note-taking strategies. AR 310.

19 **D. Discharge from Second Nature**

20 N.N. was discharged from Second Nature on August 1, 2018. AR 313. While noting that  
21 N.N. made “significant progress,” Dr. Schueler nonetheless remained concerned about N.N.’s risk  
22 of relapse in depressive symptoms, defiant behavior, and substance abuse if she were to return  
23

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24 <sup>9</sup> Curiously, when asked on direct examination by the District’s counsel whether “the Woodcock-  
25 Johnson IV [is] considered racially, culturally, or sexually discriminatory for a student like N.N.,”  
26 Ms. Starks’s answer was transcribed as: “According to the publisher’s, you know, pamphlets and  
27 so forth, yes.” AR 2142:7-11 (emphasis added). It is unclear whether this may be a mistake in the  
28 transcription of the proceedings or whether Ms. Starks might have misunderstood or misheard the  
question. However, there was no follow-up on that answer during the hearing. And while  
plaintiffs challenge the sufficiency of the District’s psychoeducational assessment (discussed  
below), no one argues that the Woodcock-Johnson IV was an inappropriate testing tool to assess  
N.N.

1 home after leaving the program. AR 313; 315. For any long-term gains to be made, Dr. Schueler  
2 recommended that N.N. be placed directly “in a residential or therapeutic boarding school setting  
3 after Second Nature so that she can practice and internalize the tools she learned at Second  
4 Nature.” AR 315. Additionally, Dr. Schueler noted that “[s]chool accommodations and a more  
5 individualized instruction plan will be important for academic success. The school needs to be  
6 aware of [N.N.’s] previous personal challenges as they create a plan that can support weaknesses  
7 and encourage strengths.” AR 315.

8           **E. Explorations Program**

9           On August 2, 2018, the day after her discharge from Second Nature, N.N. arrived at the  
10 Explorations residential program in Montana. AR 318. Penny James, the program’s founder and  
11 director, describes Explorations as a “private alternative adolescent residential program” and  
12 “adolescent transition home.” AR 2174:10-16; 2185:15-16. Ms. James testified that when  
13 Explorations was founded in March 1990, there were only therapeutic boarding schools and some  
14 wilderness programs available for at-risk teens. Explorations was intended to provide an  
15 alternative treatment facility that fell somewhere between those two options. AR 2170:6-18.

16           According to Ms. James, Explorations does not specialize in the treatment of substance use  
17 disorders. AR 2185:17-19. While Explorations students are required to remain sober, Ms. James  
18 does not believe the program accurately is described as a “sober living home,” a term which she  
19 connotes with after-care placement for a student who has had drug and alcohol treatment.  
20 AR 2185:4-11. Although Ms. James acknowledged that Explorations may have a student who  
21 struggles with substance abuse, “that isn’t the bulk of why the student is [at the program].”  
22 AR 2185:13-15. Nor does she agree that Explorations appropriately is characterized as a “group  
23 home,” a term which she believes refers to placement at a state-run home that provides more  
24 limited services for a short period of time. AR 2185:20-2186:11.

25           Explorations is licensed to treat up to 12 students, with ages generally ranging from 13 to  
26 18 years old. AR 2175:7-10; 2176:1-4. Students live at the Explorations facility and have a  
27 supervised study hall three to four times per week, weekly group therapy sessions, and weekly  
28 individual therapy sessions that also include family therapy/therapeutic phone calls to their

1 parents. AR 2180:9-16.

2 Explorations is not licensed as a residential treatment center, nor is it licensed as a school.  
3 It does not have a special education teacher on its staff. AR 2231:25-2232:5; 2233:5-13. For their  
4 education, Explorations students attend local public schools during the week, without any  
5 Explorations staff members present. AR 2179:16-17, 24-25. As Ms. James testified, “by and  
6 large the kids are at school, attending the public high school, just like [any] kids might do,” and  
7 much like any other student who lives in the town. AR 2180:3-5, 2216:4-9. Explorations serves  
8 as the primary contact for its students vis-à-vis the school and, except in certain circumstances  
9 where a parent’s direct involvement is required or desired (e.g., an individual education program, a  
10 disciplinary matter, or college counseling), the school’s communications, including report cards,<sup>10</sup>  
11 are sent directly to Explorations, which then passes communications on to parents. AR 2217:7-10,  
12 16-23; 2218:21-25; 2219:9-17.

13 Ms. James explained that Explorations does not provide a school as part of its program  
14 because its “model . . . is built around the opportunity for kids to practice in normative life things  
15 for a portion of their day. And then be able to bring back those experiences and that learning to a  
16 therapeutic environment, where they can process it, receive support, and develop plans.”  
17 AR 2239:1-8. The purpose is to provide a program that “is inter-joined and inter-connected with  
18 real life experiences” in order to ease a student’s transition back to a less restrictive setting.  
19 AR 2239:11-16.

20 Ms. James, who holds a bachelor’s degree in secondary education and is certified as a  
21 parent coach, lives at the facility. AR 2170:19-22; 2177:5-8. Explorations has several full- and  
22 part-time therapists on its staff. AR 1849:1-5; 1865:3-7. Bruce Boudousquie is Explorations’  
23 full-time lead therapist and is a licensed clinical professional counselor in Montana. AR 1971:8-  
24 11; 1973:2-6; 1975:19-24. Mr. Boudousquie does not live at Explorations, but he testified that he  
25 is there about 40-60 hours per week and eats meals there. AR 2004:23-2005:6. Amy Henderson

26  
27 <sup>10</sup> Parents are able to check their child’s school grades at any time online. See AR 2458:8-14;  
28 2515:6-10.

1 works as a part-time therapist at Explorations under Mr. Boudousquie's supervision. AR 1848:11-  
2 14; 1849:1-5. She has a bachelor's degree in elementary education and a master's degree in  
3 counseling; at the time of the administrative hearing, she was working on her licensure as a  
4 clinical professional counselor. AR 1847:8-1848:1. Mr. Boudousquie and Ms. Henderson  
5 provide individual and family therapy sessions and facilitate weekly group therapy meetings.  
6 AR 1851:15-25; 1852:1-4; 1974:7-11; 1975:25-1976:15. Although Mr. Boudousquie initially  
7 served as N.N.'s therapist during her first year at Explorations, Ms. Henderson became her  
8 therapist for the remainder of her stay at the program. AR 1851:8-18; 1976:16-20; 1977:10-16.

9 Alysoun Johnston, who holds a bachelor's degree in anthropology, provides on-site  
10 academic support for all Explorations students. AR 1856:25-1857:2; 1890:10-22. She described  
11 that "academic support" as "providing a tutoring environment" or "study environment," as well as  
12 "academic coaching," including building weekly study plans, mandatory structured study time,  
13 and individual subject-based tutoring. AR 1890:23-1891:8. During N.N.'s stay at Explorations,  
14 Ms. Johnston managed the study hall and also conducted weekly one-on-one sessions with  
15 students, during which she would follow-up on each student's weekly study goals, longer term  
16 semester and school-year goals, and any areas where a student needed individual support.  
17 AR 1892:24-1893:24; 1897:9-21; 1898:21-1901:1-22.

18 According to Ms. James, Explorations is not a behavior modification placement and  
19 instead aims to provide "a more realistic environment . . . for kids to internalize [behavior]  
20 change[s], and practice these changes in a more normative environment, at a more normative  
21 pace[.]" AR 2192:20-2193:3. To that end, students are responsible for keeping their personal area  
22 neat and clean. They also have rotating daily chores, such as cooking or serving meals, setting the  
23 table and cleaning the bathrooms. AR 2181:12-2182:12. Explorations tracks a student "in a lot of  
24 the same ways that parents at home may track" their children, by looking a student's grades, study  
25 habits, and chores. AR 2193:7-8, 10-15. For example, Ms. James testified that they "link daily  
26 chores and daily participation in study hall to [students'] weekly allowance," such that students  
27 who do not do their daily chores do not get their daily allowance, as "[t]hat's more real life kind of  
28 thing." AR 2193:13-17.

Under a typical<sup>11</sup> Monday-Friday schedule, Explorations students are generally expected to be ready and in the kitchen for breakfast by 6:15 a.m. After a short morning meeting to discuss the day, staff take students to the bus stop for school. AR 2179:16-23. As noted above, Explorations students attend local public high schools like any other student, without Explorations staff present. AR 2179:24-25. Depending on any extracurricular activities they might be involved in, students return to Explorations between 4:00 p.m. and 6:00 p.m. AR 2180:6-8. Explorations' supervised study hall is open from 4:30 p.m. to 6:30 p.m., followed by dinner; then study hall reopens from 7:00 or 7:15 p.m. to 8:45 p.m. AR 1901:19-22. While students have different activities and schedules, for the most part they are required to attend study hall from 4:30 to 6:30 p.m. before dinner. AR 1901:22-1902:5. Group therapy sessions, which are attended by all Explorations students and as many staff as are available, generally are held on Wednesdays and typically last around two hours. AR 1852:13-17; 1864:4-6; 1975:1-18; 2180:10-11. The function of group therapy is to check in with the students, and weekly group topics generally relate to upcoming events or issues within the Explorations household. AR 1852:5-12; 1974:12-24. Additionally, at least once per week, each student also participates in individual and family therapy sessions after school. AR 2180:11-16.

Friday evenings and weekends are reserved for mostly recreational pursuits. Students can wake up later, have brunch, or attend church if they wish. AR 2180:18-2181:6. Ms. James testified that Sundays are "like it might be at your house, where everybody's kind of preparing for the week." AR 2181:7-8.

Like all Explorations students, N.N. was required to attend the program's supervised study hall, which generally was held Monday, Tuesday and Thursday nights, and later expanded into Sundays. She also met weekly with Ms. Johnston, who as noted above, managed the study hall and conducted weekly one-on-one sessions with students. AR 1893:10-24; 1897:3-21; 1899:16-1900:24; 1903:11-17. Ms. Johnston's individual student meetings could range from 30-90

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<sup>11</sup> Ms. James testified regarding a typical schedule under pre-COVID-19 pandemic conditions (AR 2179:12-14), which would apply to the majority of the period during which N.N. was at the Explorations program.

1 minutes in length and generally averaged about two hours, depending on the student's needs at the  
2 time. AR 1898:21-1899:15. Ms. Johnston wrote weekly reports (primarily for Ms. James, Mr.  
3 Boudousquie, and another staff member at Explorations) regarding each student's progress in  
4 classes and in study hall. AR 1920:11-1922:19.<sup>12</sup>

5 In addition to attending weekly group therapy sessions, N.N. had weekly individual and  
6 family therapy sessions. Mr. Boudousquie was N.N.'s therapist for most of her first year at  
7 Explorations. AR 1976:16-20. He saw her on a weekly basis and also had family therapy sessions  
8 with N.N. and T.T. AR 1976:21-25. He observed that when N.N. first came to Explorations, she  
9 "was fairly positive on the outside." AR 1988:9-10. But as he got to know N.N., Mr.  
10 Boudousquie "saw her depression," and agrees that she would not necessarily present to someone  
11 as depressed unless that person spent some time with her. AR 1988:10-11; 1990:8-10, 20-24. He  
12 testified that he believed N.N. initially was "putting on a good face" to get out of the program as  
13 quickly as possible. AR 1988:16-18. Mr. Boudousquie testified that N.N. "had some issues" with  
14 him and did not necessarily like his approach to certain things. AR 1977:18-19. Ms. Henderson  
15 became N.N.'s therapist sometime toward the end of the summer 2019 and continued with N.N.'s  
16 weekly individual and family therapy sessions. AR 1851:11-18.

17 **F. 2018-2019 School Year**

18 On August 6, 2018, T.T. notified the District that N.N. had settled in at the Explorations  
19 program. AR 318. With T.T.'s permission, Ms. James enrolled N.N. at Thompson Falls High  
20 School ("TFHS"), a small Montana public high school. Ms. James, with T.T.'s permission, also  
21 signed releases authorizing the District to exchange information with TFHS. The District also had  
22 a release to speak with Explorations. AR 1039; 1044; 1046; 2213:8-15; 2414:17-20.

23 Ms. James testified that Explorations is located on the border between two school districts,  
24

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25 <sup>12</sup> Ms. Johnston's weekly assessments, which she created using a particular application, were used  
26 to determine how much weekly allowance each student received. Although her weekly reports  
27 included a "Score" category, Ms. Johnston testified that she based her assessments on a student's  
28 attendance, conduct during study hall, whether the student kept up with weekly study plans, and  
whether the student had any late work. AR. 1921:13-19. Thus, she testified that a "Score" of  
"0/0" on her weekly reports does not mean anything academically. AR 1922:1-5. It was not until  
the following year that she began using the "Score" category to record points that could be  
translated into the amount of allowance a student received. AR 1922:5-12.

1 and pursuant to a tri-school agreement, children can choose to go to either the Noxon public  
2 schools or the Thompson Falls public schools. AR 2208:16-2209:4. Ms. James testified that she  
3 likes that she “can choose the school that fits the needs of [her] students best.” AR 2209:6-7.  
4 While Explorations had begun to develop a relationship with the Noxon school district, the “high  
5 majority” of Explorations students go to TFHS, which Ms. James feels “provide[s] a better variety  
6 of educational opportunities” and where Explorations “had good success” with students who  
7 wished to take AP courses. AR 2209:3-4; 2209:14-2210:8.

8           **1.       Dr. Michelle Nutter’s Psychoeducational Assessment**

9           In addition to an evaluation of N.N.’s academic skills, the District’s special education  
10 assessment plan called for a psychoeducational evaluation by a school psychologist in a number of  
11 areas, including health, intellectual development and social/emotional behavior. AR 299. The  
12 District hired school psychologist Michelle Nutter, Ph.D. to conduct N.N.’s psychoeducational  
13 evaluation to determine whether she qualified for special education services. AR 1506:15-21; *see*  
14 *also* AR 1488:20-21. Dr. Nutter has a bachelor’s degree in Liberal Studies, a master’s degree in  
15 special education, and a Ph.D. in educational policy and management as a school psychologist.  
16 AR 1030-31; 1486:4-1488:14. She works for the San Ramon Valley Unified School District as a  
17 school psychologist. AR 1488:19-20. Although the District has its own school psychologist, Dr.  
18 Nutter testified that she is brought in on “more complicated” cases, namely, matters involving  
19 students with social-emotional or behavioral issues. AR 1496:22-1497:14.

20           Dr. Nutter traveled to Montana and assessed N.N. at Explorations on August 24 and 25,  
21 2018. AR 337; 1510:24-1511:12. Dr. Nutter also reviewed available records;<sup>13</sup> spoke with Ms.  
22 Starks and considered Ms. Starks’s July 2018 academic assessment of N.N.; interviewed Mr.  
23 Rosenberg, Ms. James and Rich Ferris, TFHS’s principal; interviewed and received information  
24 from T.T.; spoke with Dr. Schueler; and also spoke briefly with Dr. Anna Parnes, a CHC clinician.  
25 AR 337-358; 1511:17-23; 1513:14-1515:1; 1662:11-19; 1663:16-24. Dr. Nutter did not observe  
26

27           

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<sup>13</sup> Dr. Nutter testified that her records review was concentrated through N.N.’s middle school  
28 years because N.N.’s cumulative record was on the way to TFHS at the time of the evaluation.  
AR 1663:16-24. Dr. Nutter did review full transcripts. *Id.*

1 N.N. in a classroom setting because school was not yet in session at the time of her evaluation.  
2 AR 1662:15-16.

3 Dr. Nutter concluded that N.N. was not eligible for special education services. AR 337-  
4 358. In summarizing her findings, Dr. Nutter observed that “N.N. is a capable teenager,” with  
5 “intellectual and cognitive abilities [that] fall mostly within the average to high average range,” as  
6 well as “strong” “perceptual/fluid reasoning, visual processing, oral expression, and long term  
7 storage and retrieval” abilities. AR 350. Dr. Nutter further noted that when she pays attention,  
8 N.N.’s receptive and auditory reasoning skills are “well developed” and that “[a]cademically,  
9 writing emerged as an area of strength.” *Id.*

10 Dr. Nutter also noted several areas of concern. With respect to higher level attention, Dr.  
11 Nutter found that N.N. “has the capacity to focus” and that “[h]er working memory skills fall  
12 within age level expectations.” *Id.* “However, variability was noted on tasks that placed greater  
13 demands on sustained visual and auditory attention, sustained effortful processing, and multi-  
14 tasking.” *Id.* Dr. Nutter also reported “some mild weakness in the area of executive functioning:  
15 synthesizing details, cognitive flexibility, and self-monitoring/metacognition,” that can cause N.N.  
16 to “become overwhelmed and shut-down/disengage from class work.” *Id.*

17 As for N.N.’s social/emotional functioning, Dr. Nutter noted the CHC’s diagnoses of  
18 Major Depressive Disorder, Recurrent, Severe without psychotic features, and Generalized  
19 Anxiety Disorder and remarked that “test findings indicated that [N.N.] has a history of  
20 experiencing a great deal of depression and anxiety relative to other teenagers,” as well as “a great  
21 deal of anger and sadness toward her mother, which has manifested, over time, in poor social  
22 choices and feelings of sadness and depression.” AR 340; 350; 351. In reviewing N.N.’s social  
23 and academic history, Dr. Nutter noted that N.N. “was enrolled in several schools within the city  
24 of Los Altos, CA before transitioning to high school, which was a source of stress and angst for  
25 [N.N.]” and “a source of conflict between [N.N.] and her mother.” AR 338. Additionally, Dr.  
26 Nutter discussed “a great deal of familial stress,” with N.N. reporting “that her mother does not  
27 understand her and has been the source of many of the stressors in her life, most notably the  
28 decline in her relationship with her aunt,” whom N.N. regarded as a “mother figure.” AR 351; *see*

1 also AR 338; 1519:3-23; 1520:17-1521:1. Dr. Nutter also noted that T.T.’s responses on rating  
2 scales endorsed significant concern with respect to N.N.’s mood and behavior and placed N.N. in  
3 the at-risk range for conduct issues, anxiety, depression and withdrawal. AR 350; 1513:14-17.

4 During her assessment of N.N., Dr. Nutter administered certain rating scales and reported  
5 that N.N.’s responses on the Behavior Assessment System for Children—Third Edition (“BASC-  
6 3”) rating scales “reflect significant levels of depression, withdrawal, and negativity toward school  
7 and parents.” AR 351; 1596:18-25. However, Dr. Nutter testified that during testing, N.N. stated  
8 that she answered the BASC-3 questions retrospectively, as if she were still living at home in Los  
9 Altos. AR 1596:11-12, 18-25; 1598:25-1599:5, 14-16. Dr. Nutter reported that testing revealed  
10 that N.N. “finds her life in Los Altos to be depressing and a source of anxiety, in large part  
11 because of how she feels at home which spills over to apathy at school.” AR 351.

12 By contrast, Dr. Nutter noted that N.N.’s responses on the Children’s Depression Inventory  
13 (“CDI”) rating scales were “more real time” and based on N.N.’s “current state at that time.”  
14 AR 1596:13, 16-18. Those CDI responses, according to Dr. Nutter, indicated that N.N. did “not  
15 appear to feel the same level of emotional distress at Explorations or [TFHS]” and “did not reflect  
16 significant level of depression or sadness.” AR 351; 1596:16-18. Indeed, Dr. Nutter stated that  
17 “[r]eports from staff at Explorations as well as from [TFHS], indicate that [N.N.] is an interactive  
18 and compliant teenager.” AR 351. In particular, Dr. Nutter noted that while Ms. James reported  
19 that N.N. could “engage in typical teen ‘snarkiness’” and tended toward negative thinking, N.N.  
20 was not so negative that it impacted her relationship with others. AR 341; 352. According to Dr.  
21 Nutter, Ms. James also reported that N.N. made progress behaviorally and emotionally,  
22 consistently performed her chores well and on time, and was “beginning to hold good boundaries  
23 with people” and to make friends. AR 341. Additionally, Dr. Nutter noted that TFHS principal,  
24 Rich Ferris, reported in September 2018 that N.N. had “acclimated well socially as well as  
25 academically,” was participating in cross-country sports, and was “completing assigned work  
26 without any accommodations or instructional support,” with grades in the A and B range.  
27 AR 339. He further noted that N.N. is “very social, outgoing and liked by her peers,” and that he  
28 had no concerns about N.N. “academically, behaviorally, or emotionally at this time.” AR 339;

1 341.

2        Ultimately, Dr. Nutter concluded that N.N. was not eligible for special education services  
3 under the three eligibility criteria of emotional disturbance, other health impairment, and specific  
4 learning disability.<sup>14</sup> With respect to emotional disturbance, while Dr. Nutter acknowledged that  
5 N.N. “has a history of experiencing a general pervasive mood of unhappiness or depression,” Dr.  
6 Nutter also noted “a change in [N.N.’s] mood” after the end of May 2018; that N.N. did not  
7 present at TFHS “as sad to a marked degree”; and that N.N. “demonstrated the ability to access the  
8 core curriculum at [TFHS] . . . [and] is attending class and completing work without any  
9 accommodations or intervention support.” AR 352; *see also* AR 1608:1-1609:4. Similarly, with  
10 respect to the criteria for other health impairment, Dr. Nutter noted N.N.’s diagnosis of Major  
11 Depressive Disorder and Anxiety, as well as attention issues, but concluded that “at this time,  
12 [N.N.] is demonstrating the ability to access core instruction, in spite of the above profile, without  
13 accommodations or interventions.” AR 352; *see also* AR 1611:9-1612:2. As for the criteria for a  
14 specific learning disability, Dr. Nutter found that despite “a processing disorder in the area of  
15 attention” and “a relative weakness in the area of reading,” N.N.’s performance at TFHS indicated  
16 that she “is accessing the core curriculum, without any additional supports.” AR 353.

17        With respect to services N.N. was receiving at Explorations at the time of her assessment,  
18 Dr. Nutter testified that she was aware that N.N. was receiving therapy at Explorations, but was  
19 not aware that N.N. had a treating therapist there or that any academic support was being  
20 provided, beyond the proctoring of final exams in chemistry and Spanish that N.N. had missed at  
21 the end of the 2017-18 school year at LAHS. AR 1543:9-18; 1612:9-22; 1645:21-25; 1756:5-11.  
22 Dr. Nutter also testified that she was not aware that N.N. was receiving any direct instruction to  
23 support executive functioning skills, such as organizing her work, keeping track of assignments, or  
24 breaking down long-term assignments over time. She acknowledged that Ms. James discussed  
25 “some of the structures in place,” including the “schedule of chores that [students] were to

26 \_\_\_\_\_  
27 <sup>14</sup> Although Dr. Nutter’s report states that N.N. “requires special education to receive benefit from  
28 the general education program” (AR 352), Dr. Nutter testified that she only meant to state what  
N.N. needs to demonstrate in order to be found eligible for special education, and did not intend to  
suggest or conclude that N.N. requires special education services. AR 1606:17-1607:8.

1 follow,” which Dr. Nutter agreed could help with executive functioning deficits. AR 1543:19-  
2 1544:9; 1612:23-1613:18. However, Dr. Nutter testified that she understood Ms. James to be  
3 describing, not particular services, but features that were “just inherent in the program.”  
4 AR 1613:11-12. Dr. Nutter did not consider services N.N. received at Explorations to be special  
5 education services. AR 1616:20-1617:2.

6 **2. September 18, 2018 Individual Education Program Meeting**

7 On September 18, 2018, the District convened an individual education program (“IEP”)<sup>15</sup>  
8 meeting, which was attended by T.T., Ms. Starks, Ms. Mark, Dr. Nutter, and Kristen Hardy, who  
9 began working as the District’s new Director of Special Education in mid-July 2018. AR 365; *see*  
10 *also* AR 2251:17-25. The District’s special education assessment was reviewed, and Ms. Starks  
11 and Dr. Nutter reported their findings. AR 360-69. According to the notes of the IEP meeting,  
12 “Ms. Hardy explained that the purpose of this evaluation is to identify if [N.N.] requires special  
13 education and related services in order to access her education,” meaning “specialized academic  
14 instruction” (“SAI”), and that it was “beyond the scope of the current evaluation to consider other  
15 medical and environmental factors that may be very beneficial to consider in supporting [N.N.]  
16 and her return home.” AR 367. Additionally, the IEP notes state that the IEP “team discussed  
17 what SAI looks like” and that T.T. “agreed that [N.N.] did not require SAI.” *Id.* The District  
18 concluded that N.N. was not eligible for special education and related services. AR 361; 366.

19 T.T. signed the IEP document as “to attendance only,” noting that she did “not consent to  
20 anything.” AR 368. She testified that she disagreed with the District’s conclusion that N.N. was  
21 not eligible for special education services. AR 2461:14-2462:2.

22 In December 2018, T.T. filed a formal due process complaint against the District, which  
23 was withdrawn in January 2019. *See* AR 125; 2366:15-18; 2367:2-3; 10-13, 2368:7-12; 2462:17-

24  
25 <sup>15</sup> An “IEP” refers to “a written statement for each child with a disability” that outlines “the child’s  
26 present levels of academic achievement and functional performance,” states “measurable annual  
27 goals, including academic and functional goals,” describes “the child’s progress toward meeting  
28 the annual goals,” and outlines the child’s educational plan, including “the special education and  
related services and supplementary aids and services” to be provided to the child. *See* 20 U.S.C.  
§ 1414(d)(1)(A).

1 24.

2 **3. Dr. Nicole Medina's Psychological Evaluation**

3 In February 2019, T.T. obtained a private psychological assessment by clinical  
4 psychologist Nicole (Shewey) Medina, Psy.D.<sup>16</sup> AR 434-59. Dr. Medina, who holds a clinical  
5 psychologist license in Utah, evaluated N.N. on February 4, 2019 and noted that the purpose of  
6 her assessment was "to provide a more detailed conceptualization of her strengths, weaknesses,  
7 and psychological functioning." AR 435. Dr. Medina gathered information based on a clinical  
8 interview of N.N., a review of available records, and interviews with T.T. and Mr. Boudousquie,  
9 who was N.N.'s therapist at Explorations at that time. AR 437.

10 Dr. Medina found no deficits in N.N.'s cognitive abilities and found that her overall  
11 academic skills were in the average range; but she noted difficulties in math computation and  
12 reading comprehension, as well as memory issues. AR 445; 447. Dr. Medina posited that N.N.  
13 likely has an avoidant attachment style, stemming from familial difficulties including her parents'  
14 divorce when she was a toddler, a strained relationship with T.T., and decreased closeness with  
15 her aunt, whom N.N. referred to as her "real mom." AR 452. With respect to N.N.'s emotional  
16 functioning, Dr. Medina stated that N.N. reported drug and alcohol use to mask feelings of sadness  
17 and emotional pain. While Dr. Medina noted N.N.'s history of suicidal ideation, she reported that  
18 N.N. did not currently endorse such symptoms or symptoms indicating a more severe depressive  
19 disorder. AR 453. Using criteria from the Diagnostic and Statistical Manual of Mental Disorders  
20 ("DSM-5"), Dr. Medina diagnosed N.N. with Attention Deficit Hyperactivity Disorder  
21 ("ADHD"), Combined Presentation; Persistent Depressive Disorder (Dysthymia); Specific  
22 Learning Disorder with Impairment in Mathematics; Alcohol Use Disorder; Cannabis Use  
23 Disorder; and Parent-Child Relational Problem, with a need to rule out Mixed Expressive-  
24 Receptive Language Disorder or Language Processing Disorder. AR 454.

25 Dr. Medina opined that N.N. "currently requires a structured environment that will hold  
26 her accountable, assist her in treatment buy in, and offer substantial assistance with academics."

27  
28 <sup>16</sup> Although Dr. Medina is referred to variously in the record as Nicole Shewey and Nicole Medina, for convenience the Court will refer to her as Dr. Medina.

1 AR 453. If N.N. were to return home “without completing necessary family and individual  
2 therapy work,” Dr. Medina stated that N.N. was likely to relapse in her drug and alcohol use and  
3 poor academic performance. *Id.* Dr. Medina recommended that N.N. not “return to public school,  
4 or any less restrictive environment, given her attitude toward therapy and propensity for relapse.”  
5 AR 454.

6 Although Dr. Medina’s report indicates that she interviewed Mr. Boudousque, there is no  
7 mention in the report whether Dr. Medina was aware that at the time of her assessment that N.N.  
8 was attending TFHS. Additionally, Ms. Hardy testified that Dr. Medina did not contact LAHS for  
9 any information. AR 2368:13-2369:1.

10 Dr. Medina did not testify at the administrative hearing.

#### 11 4. N.N.’s Progress at TFHS and Explorations

12 As noted above, in September 2018, TFHS principal Rich Ferris reported to Dr. Nutter that  
13 N.N. had transitioned well as a student at the school, had “acclimated well socially as well as  
14 academically,” was participating in cross-country sports, and was “completing assigned work  
15 without any accommodations or instructional support,” with grades in the A and B range.  
16 AR 339. He further noted that N.N. is “very social, outgoing and liked by her peers,” and that he  
17 had no concerns about N.N. “academically, behaviorally, or emotionally at this time.” AR 339;  
18 341.

19 The record also contains a document entitled “Section 504 Accommodations for [N.N.]  
20 2018-2019 School Year” at TFHS. AR 371. Noting that N.N. had been identified for a 504 plan  
21 the previous school year at LAHS under the criteria for anxiety, TFHS implemented a similar 504  
22 plan for N.N., with the following accommodations: “[e]xtended time on assignments as decided  
23 in conjunction with the teacher”; “[e]xtended time, up to 1.5 on tests with the option to test in a  
24 less disruptive environment”; monthly meetings between N.N. and each of her teachers; and “[n]o  
25 accommodations in elective classes.” *Id.* This plan was signed by Mr. Ferris, Ms. James and N.N.  
26 on October 5, 2018. *Id.* Ms. James testified that she signed the 504 plan, and that in doing so, she  
27 agreed that the plan was appropriate, at least based on her limited view of N.N. six weeks into the  
28 Explorations program. AR 2228:6-23; 2241:2-15.

1       In terms of N.N.'s therapy at Explorations, Mr. Boudousquie testified that treatment goals  
2 focused on N.N.'s depression and anger, her interaction with peers, and her family relationships,  
3 including with her parents and her aunt. AR 1977:3-9; 1991:17-1992:5. N.N. did not present as  
4 suicidal at that time, although she would talk about wanting to be back in California because she  
5 missed her friends. AR 1991:2-5, 11-16. Over the course of the year, N.N. reported enjoying  
6 school because of the friends she was making there, although she did not necessarily like the  
7 academic aspect of school generally. AR 1992:21-1993:1. Mr. Boudousquie talked with N.N.  
8 about "staying focused because there's times when she'd get sidetracked thinking about the  
9 socializing and such versus the actual school work and academics." AR 1993:19-22. He would  
10 also encourage N.N. to talk with her teachers if she had an issue with them and to use Ms.  
11 Johnston as a resource. AR 1993:16-19. However, Mr. Boudousquie did not recall how N.N. was  
12 performing in school at that time and testified that students generally talk to him about how they  
13 feel about school, and not how they are performing academically. AR 1993:4-9. Academic  
14 matters generally were addressed by Ms. James or Ms. Johnston. AR 2007:5-17; 2007:25-2008:1.  
15 In general, Mr. Boudousquie did not communicate with TFHS about Explorations students, except  
16 on occasion if a TFHS counselor would call Ms. James or Ms. Johnston about an emotional or  
17 behavioral issue that they felt warranted discussion with him. AR 2007:12-17. With respect to  
18 N.N., Mr. Boudousquie did not talk with TFHS about her, and he could not recall whether TFHS  
19 ever called him to discuss N.N.'s mood at school. AR 2006:23-2007:4.

20       N.N. regularly attended Explorations study hall and was generally present for individual  
21 weekly meetings with Ms. Johnston. Ms. Johnston testified that if N.N. was absent, it usually was  
22 due to extracurricular school activities or illness. AR 1903:11-17; 1906:16-1907:2. For those  
23 times when N.N. missed study hall, Ms. Johnston stated that as early as Spring 2019, N.N. had  
24 demonstrated that she was responsible enough to earn a "time card," meaning that N.N. could  
25 independently track and record the time she spent studying to count toward her study hall hours.  
26 AR 1904:18-1905:10; *see also* AR 416, 418.

27       During the first semester of N.N.'s junior year at TFHS, Ms. Johnston noted in October  
28 2018 that N.N. maintained fairly good grades, consistently attended study hall, updated her study

1 planner, and showed good task initiation when under pressure. AR 404. However, Ms. Johnston  
2 observed that N.N. was also easily distracted and did not use her time wisely. AR 401; 404. By  
3 November 2018, N.N. was accruing a larger number of missing assignments and getting Cs or Ds  
4 in classes where she previously had Bs. AR 401; 402; 1910:1-8. In mid-November 2018, Ms.  
5 Johnston reported that N.N. showed “an improved attitude in study hall and focus on her work,”  
6 and had asked for more time on testing and writing assignments per her 504 plan. AR 399-404.  
7 By the end of November 2018, N.N. still had nine missing assignments and was following only  
8 25% of her study plan. AR 399. Ms. Johnston believed that N.N.’s academic performance was  
9 impacted, at least in part, by a negative self-image and that N.N. “worked to confirm that to  
10 herself by . . . not putting that much effort into her grades[.]” AR 1928:13-18. Ms. Johnston  
11 testified that her work with N.N. during her junior year involved building a “can-do attitude,”  
12 creating study skills, developing an organized approach to her course work, advocating for herself,  
13 and being more respectful in her interactions with adults. AR 1925:22-1926:3, 17-23.

14 In January 2019, early in the second semester of N.N.’s junior year, Ms. Johnston felt that  
15 N.N. experienced a turning point after suffering a concussion and seemed “to really start doing her  
16 work more intentionally than she had been doing” and recognized that she could earn good grades  
17 if she made the effort. AR 1928:23-1929:9. Thereafter, Ms. Johnston observed an overall  
18 improvement in N.N.’s grades and relationships with teachers. AR 1929:15-1930:18. Ms.  
19 Johnston’s weekly reports during this period show that while N.N.’s grades fluctuated, she  
20 generally maintained As and Bs in her courses, though her English grades fell at times due to  
21 missing assignments. AR 405-420. A TFHS fourth quarter report card of mid-term grades shows  
22 that N.N. received As in English II, chemistry, computer apps and college prep courses; a B in  
23 algebra II; a D- in English III (with a notation indicating that N.N. had missing work); and a D- in  
24 U.S. history. AR 463. However, by the end of her junior year, N.N.’s transcript appears to show  
25 that she earned mostly As and Bs (with a C- in a yearbook class), and had a grade point average of  
26 3.385. AR 1052.

27 In her June 14, 2019 year-end summary report, Ms. Johnston noted that N.N.’s strengths  
28 were “Math, writing (expression & structure), organization, concrete sequential and critical

1 thinking skills.” AR 474. Her weaknesses included “Reading (very avoidant), writing (syntax,  
2 voice, mechanics & citations, vocabulary & efficiency), and abstract thought.” *Id.* Additionally,  
3 Ms. Johnston noted that N.N. tended to become overwhelmed by work and did not follow through  
4 on studying for standardized tests. *Id.* Ms. Johnston further observed that while N.N. was  
5 resistant to studying Spanish at the beginning of the year, she “improved her efforts significantly  
6 from the first to the second semester, earning a notable 3.871 G.P.A. in the third quarter, and very  
7 high scores on several final exams.” *Id.* Additionally, Ms. Johnston noted that N.N. “did well”  
8 balancing responsibilities for her new service dog with her daily assignments. *Id.* In all, Ms.  
9 Johnston stated that N.N. “successfully completed 11th grade for the 2018-2019 academic year.”  
10 *Id.*

11 Ms. Johnston recommended a reading program to “increase[] literacy and encourage[e]  
12 readership.” *Id.* For N.N.’s senior year, Ms. Johnston further recommended an academic plan that  
13 included “reading and writing practice” and “test prep.” *Id.* Additionally, Ms. Johnston suggested  
14 a speech pathologist’s evaluation of N.N.’s reading skills, and said she normally recommends such  
15 an evaluation for any student who demonstrates a reluctance to read. AR 474; 2037:13-18. Ms.  
16 Johnston is not aware that N.N. was evaluated by a speech pathologist, and she did not follow up  
17 on that issue, as that was “more of a therapeutic process . . . outside of [her] purview.”  
18 AR 2040:3-6.

19 **5. The May 16, 2019 Individual Education Program Meeting**

20 Meanwhile, T.T. provided the District with Dr. Medina’s report of her psychological  
21 evaluation of N.N. On May 16, 2019, the District convened a second IEP meeting to review that  
22 report. AR 465-72. The meeting was attended by T.T., Ms. Hardy, Ms. Starks, Dr. Nutter (who  
23 participated via telephone), Tim Farrell (an LAHS general education teacher), and Beverly Tom (a  
24 District Assistant Director of Special Education). AR 468.

25 Dr. Nutter reviewed Dr. Medina’s report and noted several areas of agreement between her  
26 assessment and Dr. Medina’s evaluation.<sup>17</sup> In particular, both assessments appeared to agree  
27

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28 <sup>17</sup> The IEP meeting notes indicate that Dr. Nutter provided an amended version of her own report  
in which she converted scores to standard scores “for ease of comparison” with Dr. Medina’s

1 regarding N.N.'s angst and her feelings toward T.T. and her early life experiences; N.N.'s feelings  
2 of stress around the time she transitioned from elementary school to middle school; and N.N.'s  
3 reports of using drugs and alcohol and the reasons why. *Id.* Dr. Nutter also noted several areas of  
4 disagreement with Dr. Medina's assessment, including Dr. Medina's conclusion that math was an  
5 area of need. The IEP meeting notes further state that while reading comprehension is an area of  
6 weakness, N.N.'s grades did not demonstrate that accommodations or remediation was required at  
7 school in order for N.N. to access the curriculum. *Id.* Dr. Nutter's biggest concern was that Dr.  
8 Medina's assessment lacked any school-based context, which Dr. Nutter felt was necessary to  
9 address special education eligibility criteria. AR 469; 1642:12-14, 17; 1643:3-11, 19-23.

10       T.T. noted that at the "group home," N.N. "receive[d] therapy" and "works with [a]  
11 tutor[.]" AR 470. As Explorations is the only "group home" in the record, T.T. presumably was  
12 referring to services N.N. received at Explorations. Other than her 504 plan and the support she  
13 received from Ms. Johnston, there is no evidence that N.N. received any assistance relating to her  
14 education during her stay at Explorations and attendance at TFHS. According to the IEP meeting  
15 minutes, T.T. expressed that "the home environment has been instrumental in the progress that  
16 [N.N.] has made[.]" *Id.* Additionally, T.T. noted that N.N. also received support from a service  
17 dog and ADHD medications. *Id.*

18       Mr. Farrell shared information received from TFHS, including that N.N.'s teachers  
19 reported that she "experienced a minor stumble due to turning in a paper late," but was "attentive,"  
20 "comfortable," "doing well," and rarely accessed her 504 plan accommodations, "with the  
21 exception of extra time to turn in long-term written assignments." AR 469. Mr. Farrell noted no  
22 reports of reading comprehension challenges. *Id.* While Dr. Nutter reflected that N.N.'s writing  
23 difficulties may be due to executive functioning challenges, N.N.'s English teacher reported that  
24 other than additional time for written assignments, N.N. required no other accommodations. *Id.*  
25 Additionally, Mr. Farrell noted that N.N.'s algebra teacher reported that N.N. generally grasped  
26

27 \_\_\_\_\_  
28 report and which Dr. Nutter stated was "typical professional practice." AR 469. Dr. Nutter  
testified that she did not recall making any substantive changes from her original report.  
AR 1647:2-6.

1 concepts and currently had a B in that class, and that there was no reference in reports from TFHS  
2 that N.N. required re-teaching or additional assistance in learning concepts. *Id.* In her past three  
3 quarters at TFHS, N.N. earned an overall grade point average of 3.151, 3.051 and 3.871. *Id.*

4 The District concluded that N.N. “continues not to be eligible for special education and  
5 related services,” because N.N. did not demonstrate that she needs special education services and  
6 because “the accommodations she is receiving through a 504 [plan] is all that she requires.”

7 AR 470.

#### 8 **G. 2019-2020 School Year**

9 As noted above, around the end of the summer in 2019, Ms. Henderson became N.N.’s  
10 therapist at Explorations and continued with N.N.’s weekly individual and family therapy  
11 sessions. AR 1851:8-18. Ms. Henderson testified that N.N.’s treatment goals included self-  
12 advocacy; developing skills to manage depression and anxiety; managing her approach and  
13 interaction with peers; frustration tolerance; post-high school plans; and developing skills to plan  
14 and work toward goals in an efficient and effective manner. AR 1853:9-1854:9.

15 Ms. Henderson testified that she spoke with Ms. Johnston, whom she identified as  
16 Explorations’ “on-site academics support” for students, about how to best approach any of N.N.’s  
17 needs for support in school. However, Ms. Henderson did not speak with Ms. Johnston on a  
18 regular basis; rather, Ms. Henderson spoke with her “just briefly a couple of times,” as “more of a  
19 check-in.” AR 1857:3-13; 1873:10-18.

20 Ms. Johnston testified that the overall goal for N.N.’s senior year in high school concerned  
21 the development of her reading skills and timely completion of N.N.’s essay assignments.  
22 AR 1908:16-22; 1911:12-15; 1913:8-10. To that end Ms. Johnston established a reading program  
23 in which N.N. would select four books of interest to her that she would read over the course of the  
24 year. AR 424; 1913:9-14. Ms. Johnston regularly checked with N.N. on her progress, noting that  
25 N.N. “did not persist well” independently with the reading program. AR 1913:10, 25; 1914:1-4.  
26 Ms. Johnston also assisted N.N. in editing school essay assignments. AR 1918:2-4. Rather than  
27 go through the editing process together, N.N. preferred to receive Ms. Johnston’s comments and  
28 then edit her work independently. AR 1918:5-13. Ms. Johnston also met with N.N.’s English

1 teacher for the first time during a TFHS parent-teacher conference in November 2019.  
2 AR 1916:3-8. Thereafter, Ms. Johnston said that she would communicate with N.N.'s English  
3 teacher by email or occasionally by phone, and usually, Ms. Johnston would reach out to that  
4 teacher, rather than the other way around. AR 1916:10-13. Generally, Ms. Johnston reached out  
5 to teachers to follow-up on what students would report to her in terms of their progress or issues in  
6 a class. AR 1917:3-7. With respect to N.N., Ms. Johnston and N.N.'s English teacher agreed on  
7 N.N.'s progress in reading and writing, including that N.N. would read only if reading was  
8 assigned, but otherwise did not read anything (other than perhaps a short magazine article) on her  
9 own initiative. AR 1917:8-15. As for writing, Ms. Johnston and N.N.'s English teacher also  
10 agreed that while N.N.'s written expression was "well done," it was "a painfully slow process for  
11 her," and that it was "not a question of intelligence but just a question of habit development and  
12 skill development." AR 1917:23-24; 1918:20-1919:3.

13 Ms. Johnston did not communicate with N.N.'s other teachers to the same degree as she  
14 did with N.N.'s English teacher. However, she did keep in touch with N.N.'s math teacher, noting  
15 that math was "an area of strength" for N.N. because N.N. is "willing to persist in math" and had a  
16 good rapport with her teacher. AR 1919:4-14. Ms. Johnston did not believe that N.N. had a math  
17 leaning disability. AR 2024:20-23.

18 Ms. Johnston's weekly reports for the first part of N.N.'s senior year indicate that N.N.  
19 generally met her Explorations study hall and individual sessions and maintained As and Bs in her  
20 classes, with Cs in Biotech and English classes. By the end of October 2019, Ms. Johnston noted  
21 that N.N. had brought all of her grades back up to As and one B+, while continuing to plan for  
22 college and following through on her reading program. AR 421-27. Overall, Ms. Johnston noted  
23 that in her senior year at TFHS, N.N. "improved wonderfully" in "being able to stay on top of her  
24 school work, organize her time, [and] keep her planner." AR 1915:13-15. Although N.N. still  
25 struggled a little with completing her essays on time, Ms. Johnston observed that N.N.'s overall  
26 approach was much more organized. AR 1915:15-23.

27 N.N. remained at TFHS throughout the 2019-2020 school year and finished her high  
28 school career with nearly straight As. AR 1052. She graduated in June 2020 with a regular

1 diploma, awards in math and science, and an academic letter. AR 1857:15-20; 2223:17-2224:1, 6-  
2 12.

3 **II. PROCEDURAL HISTORY**

4 As discussed above, T.T. filed her first due process complaint against the District in  
5 December 2018, and withdrew it in January 2019. T.T. filed a second due process complaint in  
6 April 2019 and withdrew that complaint in June 2019. T.T.'s third due process complaint was  
7 filed in August 2019 and withdrawn in November 2019. *See* AR 125; 2366:15-18; 2367:2-3; 10-  
8 13, 2368:7-12; 2462:17-24. On March 18, 2020, T.T. (represented by plaintiffs' current litigation  
9 counsel) filed a fourth due process complaint against the District. AR 1-18. The matter proceeded  
10 to a hearing, held on June 23-25, 30 and July 1-2, 2020, before ALJ Ted Mann. ALJ Mann issued  
11 his decision on August 28, 2020, finding in favor of the District. As stated in his decision, the  
12 issues to be decided were as follows:

- 13 1. Did [the District] deny Student a free appropriate public education,  
14 referred to as a FAPE, by failing to timely respond to Parent's May  
15 2018 request for assessment?
- 16 2. Did [the District] deny Student a FAPE by failing to conduct an  
17 appropriate psychoeducational evaluation prior to the September 18,  
18 2018 individual educational program, referred to as an IEP, team  
19 meeting?
- 20 3. Did [the District] deny Student a FAPE by failing to invite all  
21 necessary members to the IEP team meetings held regarding Student  
22 in: a. September 2018? b. May 2019?<sup>18</sup>
- 23 4. Did [the District] deny Student a FAPE, during the 2017-2018,  
24 2018-2019, and 2019-2020 school years by failing to identify her as  
25 a student eligible for special education and offering her an appropriate  
26 IEP?
- 27 5. Did [the District] deny Student a FAPE at the September 2018 and  
28 May 2019 IEP team meetings by failing to offer Student an IEP?

24 AR 1069. ALJ Mann concluded that the District did not deny N.N. a FAPE at any time because  
25 plaintiffs did not meet their burden to show that N.N. was eligible for special education.

26 AR 1068-96.

27  
28 <sup>18</sup> Plaintiffs have not raised this issue on the present appeal before this Court.

1 Plaintiffs filed the present IDEA appeal in this Court on November 13, 2020. Dkt. No. 1.  
2 During the litigation, a dispute arose between the parties regarding whether plaintiffs should be  
3 permitted to supplement the administrative record with testimony from Dr. Paula Solomon, a  
4 clinical psychologist retained by plaintiffs and whom plaintiffs disclosed for the first time during  
5 the administrative due process hearing. Although ALJ Mann permitted Dr. Solomon to testify  
6 about some matters during the administrative hearing (AR 2320-42), plaintiffs argued that ALJ  
7 Mann had unfairly limited the scope of her testimony. Following briefing and a hearing, the Court  
8 granted in part and denied in part plaintiffs' request to supplement the record with testimony by  
9 Dr. Solomon. Dkt. No. 48. The Court held an evidentiary hearing on July 16, 2021 at which both  
10 Drs. Solomon and Nutter testified. Dkt. Nos. 52, 57.

11 The parties subsequently submitted their respective briefs on the present IDEA appeal and  
12 the Court held a hearing on the matter. Dkt. Nos. 55, 56, 59, 61, 63. As presented in the parties'  
13 briefing, the main issues to be resolved are as follows:

- 14 1. Whether the District denied N.N. a FAPE during the 2017-2018,  
15 2018-2019, and 2019-2020 school years by failing to identify her as  
16 a student eligible for special education and failing to offer her an  
appropriate IEP?
- 17 2. Whether the District denied N.N. a FAPE by failing to timely  
respond to T.T.'s May 1, 2018 request for assessment?
- 18 3. Whether the District Denied N.N. a FAPE by failing to conduct an  
appropriate psychoeducational evaluation?
- 19 4. Whether T.T. is entitled to reimbursement for the private  
20 educationally-related services and placement she provided N.N. in the  
absence of an offer of FAPE from the District?

22 Dkt. No. 55 at 7; Dkt. No. 59 at 8; *see also* Dkt. No. 1 ¶ 21. As discussed below, the District  
23 maintains that N.N. was not eligible for special education. The District also raises two issues,  
24 raised during the administrative proceedings, concerning the IDEA's statute of limitations and  
25 whether the District remained N.N.'s responsible local education agency after she moved to  
26 Montana. *See* Dkt. No. 59 at 8.

27 **III. STATUTORY FRAMEWORK**

28 Congress enacted the IDEA "to ensure that all children with disabilities have available to

them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.” 20 U.S.C. § 1400(d)(1)(A). Under the IDEA, all children with disabilities are entitled to a FAPE. *Id.* § 1412(a)(1). A FAPE means “special education and related services” that:

- (A) have been provided at public expense, under public supervision and direction, and without charge;
- (B) meet the standards of the State educational agency;
- (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
- (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

*Id.* § 1401(9). “Special education” is “specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability.” *Id.* § 1401(29); *see* 34 C.F.R. § 300.39(a)(1); *L.J. by and through Hudson v. Pittsburgh Unified Sch. Dist.*, 850 F.3d 996, 1004 (9th Cir. 2017). “Related services” are “transportation, and such developmental, corrective, and other supportive services . . . as may be required to assist a child with a disability to benefit from special education[.]” 20 U.S.C. § 1401(26); 34 C.F.R. § 300.34(a).

The IDEA provides federal funds to assist state and local agencies in educating children with disabilities, but conditions such funding on compliance with certain statutory requirements, including that States provide every eligible child with a FAPE. *Endrew F. v. Douglas Cnty. Sch. Dist.RE-1*, 137 S. Ct. 988, 993 (2017); *Ojai Unified Sch. Dist. v. Jackson*, 4 F.3d 1467, 1469 (9th Cir. 1993). States also have a “child find” obligation to identify, locate, and evaluate all children who may require special education and related services. 20 U.S.C. §§ 1412(a)(3), (7), 1414(a)-(c); *Timothy O. v. Paso Robles Unified Sch. Dist.*, 822 F.3d 1105, 1110 (9th Cir. 2016). States are required to comply with the IDEA’s procedural and substantive requirements, and state standards that are not inconsistent with the IDEA’s federal standards are also enforceable in federal court. *J.L. v. Mercer Island Sch. Dist.*, 592 F.3d 938, 947 (9th Cir. 2010).

The IDEA provides for a cooperative process between parents and schools, culminating in

1 the creation of an IEP for every disabled student. 20 U.S.C. § 1414; *Schaffer ex rel. Schaffer v.*  
2 *Weast*, 546 U.S. 49, 53 (2005). The IEP “must include an assessment of the child’s current  
3 educational performance, must articulate measurable educational goals, and must specify the  
4 nature of the special services that the school will provide.” *Schaffer*, 546 U.S. at 53. Additionally,  
5 the IEP must be “reasonably calculated to enable the child to receive educational benefits.” *Bd. of*  
6 *Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 207 (1982).

7 Schools are required to provide a “basic floor of opportunity” that “consists of access to  
8 specialized instruction and related services which are individually designed to provide educational  
9 benefit” to disabled students. *Id.* at 201. The IDEA does not require schools provide “a potential-  
10 maximizing education” or services “to maximize each child’s potential commensurate with the  
11 opportunity provided other children.” *Id.* at 197 n.21, 198. Rather, the IDEA requires schools to  
12 provide an education “sufficient to confer some educational benefit” on the disabled student. *Id.*  
13 at 200. While the IDEA requires an educational program that enables a disabled student to make  
14 more than merely *de minimis* progress, the relevant question is whether an IEP “is reasonable, not  
15 whether the court regards it as ideal.” *Endrew F.*, 137 S. Ct. at 999, 1001. “To meet its  
16 substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable  
17 a child to make progress appropriate in light of the child’s circumstances.” *Id.* at 999.

18 The IDEA also requires that the IEP allow the disabled student to receive an education in  
19 the “[l]east restrictive environment.” *See* 20 U.S.C. § 1412(a)(5). This means that schools are  
20 required to ensure that, “[t]o the maximum extent appropriate,” a student with disabilities is  
21 educated with nondisabled students, unless “the nature or severity of the disability of a child is  
22 such that education in regular classes with the use of supplementary aids and services cannot be  
23 achieved satisfactorily.” *Id.* § 1412(a)(5)(A); *see also* 34 C.F.R. § 300.114(a)(2)(i)-(ii) (same).

24 Parents have the right to participate in both the development and continued implementation  
25 of their child’s IEP. 20 U.S.C. § 1415(b). A party may present a complaint regarding “any matter  
26 relating to the identification, evaluation, or educational placement of the child, or the provision of  
27 a free appropriate public education to such child,” and is entitled to an impartial due process  
28 hearing before a state agency. *Id.* § 1415(b)(6)(A), (f). A party that disagrees with the results of

1 the administrative hearing before the state agency, may bring an appeal in a district court. *Id.*  
2 § 1415(i)(2)(A). “In an action for judicial review of an administrative decision, the burden of  
3 persuasion rests with the party challenging the ALJ’s decision.” *L.M. v. Capistrano Unified Sch.*  
4 *Dist.*, 556 F.3d 900, 910 (9th Cir. 2009).

5 “In determining whether a student has received a FAPE in compliance with the IDEA, the  
6 court conducts both a procedural and substantive inquiry.” *L.J.*, 850 F.3d at 1003. “The court  
7 considers whether the school complied with the procedures set forth in the IDEA.” *Id.* (citing  
8 *Rowley*, 458 U.S. at 206-07). The court also evaluates whether the student’s IEP, or the lack  
9 thereof, “was reasonably calculated to enable the child to receive educational benefits.” *Id.*  
10 “Where a court identifies a procedural violation that denied a student a FAPE, the court need not  
11 address the second substantive prong of the inquiry.” *Id.* However, “[n]ot all procedural  
12 violations constitute a denial of a FAPE.” *Id.* (citing *R.B. v. Napa Valley Unified Sch. Dist.*, 496  
13 F.3d 932, 938 (9th Cir. 2007)). Procedural violations that result in the loss of educational  
14 opportunity or seriously infringe the parents’ opportunity to participate in the IEP formulation  
15 process results in the denial of a FAPE. *Id.* (citation omitted). But “[a] procedural error is  
16 harmless if the student is substantively ineligible for IDEA benefits.” *Id.*

#### 17 **IV. STANDARD OF REVIEW**

18 In an action challenging an administrative decision under the IDEA, the district court  
19 “[i] shall receive the records of the administrative proceedings; (ii) shall hear additional evidence  
20 at the request of a party; and (iii) basing its decision on the preponderance of the evidence, shall  
21 grant such relief as the court determines is appropriate.” 20 U.S.C. § 1415(i)(2)(C). Thus,  
22 “[j]udicial review in IDEA cases ‘differs substantially from judicial review of other agency  
23 actions, in which courts are generally confined to the administrative record and are held to a  
24 highly deferential standard of review.’” *M.C. v. Antelope Valley Union High Sch. Dist.*, 858 F.3d  
25 1189, 1194 (9th Cir. 2017) (quoting *Ojai*, 4 F.3d at 1471). In assessing a challenge to an  
26 administrative decision, courts should give “due weight” to state administrative proceedings and  
27 must not “substitute their own notions of sound educational policy for those of the school  
authorities which they review.” *Rowley*, 458 U.S. at 206. While the amount of deference that the

court gives to the ALJ's findings is discretionary, it "increases where [the findings] are thorough and careful." *Capistrano Unified Sch. Dist. v. Wartenberg*, 59 F.3d 884, 891 (9th Cir. 1995) (internal citations omitted). As explained by the Ninth Circuit:

The court reviews *de novo* the appropriateness of a special education placement under the IDEA. Nevertheless, when reviewing state administrative decisions, courts must give due weight to judgments of education policy. Therefore, the IDEA does not empower courts to 'substitute their own notions of sound educational policy for those of the school authorities which they review. Rather, the court in recognition of the expertise of the administrative agency, must consider the findings carefully and endeavor to respond to the hearing officer's resolution of each material issue. After such consideration, the court is free to accept or reject the findings in part or in whole. Despite their discretion to reject the administrative findings after carefully considering them, however, courts are not permitted simply to ignore the administrative findings. At bottom, the court itself is free to determine independently how much weight to give the administrative findings in light of the enumerated factors.

*Cnty. of San Diego v. Cal. Special Educ. Hearing Office*, 93 F.3d 1458, 1466 (9th Cir. 1996) (internal quotations and citations omitted).

## V. DISCUSSION

Plaintiffs contend that the District committed several procedural violations that caused the District to deny N.N. a FAPE by failing to identify her as a student eligible for special education services in each of the school years 2017-2018, 2018-2019 and 2019-2020. The District maintains that it fulfilled its child find and other obligations and properly determined that N.N. is not eligible for special education services.

### A. Level of Deference to ALJ's Decision

Preliminarily, the Court must determine the level of deference it should give to the ALJ's decision. Courts "treat a hearing officer's findings as 'thorough and careful' when the officer participates in the questioning of witnesses and writes a decision 'contain[ing] a complete factual background as well as a discrete analysis supporting the ultimate conclusions.'" *R.B.*, 496 F.3d at 942 (quoting *Park v. Anaheim Union High Sch. Dist.*, 464 F.3d 1025, 1031 (9th Cir. 2006)). "But neither the duration of the hearing, nor the ALJ's active involvement, nor the length of the ALJ's opinion can ensure that the ALJ was 'thorough and careful.'" *M.C.*, 858 F.3d at 1194. Moreover, "blind deference" to the "length and superficial plausibility" of an ALJ's opinion is not

1 appropriate. *Id.* at 1194 n.1. Rather, a court “must actually examine the record to determine  
 2 whether it supports the ALJ’s opinion.” *Id.*

3 Here, the ALJ conducted a 6-day hearing in which he actively participated in the  
 4 questioning of witnesses. However, his written decision (less than 29 full pages) is not  
 5 particularly lengthy. While he did summarize some portions of the record, he did not provide a  
 6 comprehensive recitation of the facts or detailed analysis and explanation for his findings. Indeed,  
 7 as discussed below, he did not address certain issues at all. Accordingly, the ALJ’s findings do  
 8 not warrant the same deference afforded to “thorough and careful” findings.

#### 9           **B. Threshold Issues**

10           Before turning to the parties’ respective arguments regarding the District’s child find  
 11 obligations, the Court first addresses two threshold issues that the District contends limit the scope  
 12 of relief sought by N.N. First, the District argues that plaintiffs’ claims are time-barred to the  
 13 extent they are based on events that occurred prior to March 18, 2018. Second, the District  
 14 contends that it ceased to be responsible for N.N. after August 2018 when she enrolled in TFHS.  
 15 Although the parties presented arguments regarding these issues to the ALJ, the ALJ did not  
 16 address either of these issues in his decision. *See AR 114-19; 122-28; 176-83; 232-35; 252-55;*  
 17 1068-96.<sup>19</sup>

#### 18           **1. IDEA’s Statute of Limitations**

19           Noting that plaintiffs filed their due process complaint on March 18, 2020, the District  
 20 argues that any claims based on events occurring before March 18, 2018 are barred by the IDEA’s  
 21 statute of limitations. Dkt. No. 59 at 10-11. Under the IDEA, a parent or agency must request a  
 22 due process hearing “within 2 years of the date the parent or agency knew or should have known

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23  
 24           <sup>19</sup> Remand is appropriate where the record is insufficient to permit the district court “to make the  
 25 highly nuanced judgments necessary to resolve the claim[.]” *Jessica E. v. Compton Unified Sch.*  
*Dist.*, No. CV16-04356-BRO (MRWx), 2017 WL 28649545, at \*7 (C.D. Cal. May 2, 2017)  
 26 (citation omitted). No one argues that the ALJ’s failure to make findings on these issues requires  
 27 remand, and the Court does not find remand to be necessary or appropriate in any event. “Given  
 28 that the courts are authorized to take new evidence and may base their decisions on such new  
 evidence, while a court must give an ALJ’s findings ‘due weight,’ there is clearly no requirement  
 to remand if the ALJ fails to make necessary findings.” *Pajaro Valley Unified Sch. Dist. v. J.S.*,  
 No. C06-0380 PVT, 2006 WL 3734289, at \*4 (N.D. Cal. Dec. 15, 2006).

about the alleged action that forms the basis of the complaint[.]” 20 U.S.C. § 1415(f)(3)(C); *see also* Cal. Educ. Code § 56505(l) (“A request for a due process hearing arising under subdivision (a) of Section 56501 shall be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. . . .”). In *Avila v. Spokane Sch. Dist.* 81, 852 F.3d 936 (9th Cir. 2017), the Ninth Circuit held that the IDEA’s two-year limitations period requires courts to apply the discovery rule described in 20 U.S.C. § 1415(f)(3)(C) “without limiting redressability to the two-year period that precedes the date when ‘the parent or agency knew or should have known about the alleged action that forms the basis of the complaint.’” *Id.* at 941, 944 (quoting 20 U.S.C. § 1415(f)(3)(C)). Further, *Avila* observed that “[o]ther courts have held that the ‘knew or had reason to know date’ stems from when parents know or have reason to know of an alleged denial of a free appropriate public education under the IDEA, not necessarily when the parents became aware that the district acted or failed to act.” *Id.* at 944 (citing cases). Thus, “the IDEA’s statute of limitations requires courts to bar only claims brought more than two years after the parents or local educational agency ‘knew or should have known’ about the actions forming the basis of the complaint.” *Id.* at 937.

To the extent the District argues that the IDEA’s limitations period was triggered when T.T. became aware of facts concerning N.N.’s anxiety diagnosis (Dkt. No. 59 at 10-11), or that plaintiffs may obtain a remedy only for the two years preceding the filing of their due process complaint (Dkt. No. 59 at 10-11), the District’s arguments are inconsistent with *Avila*. *Avila* expressly rejected a “strict occurrence rule,” which would have the effect of “[c]utting off children’s or parents’ remedies if violations are not discovered within two years . . . [and] is not consistent with the IDEA’s remedial purpose.” *See Avila*, 852 F.3d at 941, 942. Moreover, as the District seems to acknowledge in its brief, the injury that is the basis of plaintiffs’ March 2020 due process complaint is the District’s alleged failure to provide N.N. with a FAPE during the three school years in question. *See* Dkt. No. 59 at 10; AR 1-18. The pertinent question is when T.T. knew or had reason to know of the District’s alleged denial of a FAPE under the IDEA, not necessarily when she became aware of N.N.’s condition or that the District acted or failed to act. *Avila*, 852 F.3d at 944.

The parties do not seriously dispute that T.T. reasonably knew or had reason to know of the District's alleged failure to provide N.N. with a FAPE by May 1, 2018 when she requested a special education assessment, and by which time T.T. had consulted with an educational consultant and an education law attorney. *See* Dkt. No. 59 at 11; Dkt. No. 61 at 3; *see also* AR 287. The May 1, 2018 date also is supported by the record. T.T. testified that she did not have any particular knowledge or experience in education law or special education. AR 1779:19-1780:1. The record is ambiguous as to exactly what information the District provided T.T. prior to May 2018. Mr. Betancur testified that he told T.T. in November 2017 "that special ed[ucation] support may be necessary down the road" and to "inquire about a special ed[ucation] eval[uation] if more is needed" beyond a 504 plan. AR 994; 2122:22-2123:17. However, Mr. Betancur did not provide T.T. with a copy of the IDEA procedural safeguards. AR 2124:14-16. While Mr. Rosenberg testified that the District's normal procedure was to provide parents receiving a 504 plan with documentation, including a brochure "that describes what eligibility means, what 504 plans are, what IDEA is, what special education services are," it is unclear whether T.T. actually received such documentation in the package of information regarding N.N.'s 504 plan. *See* AR 1225:7-10; 1809:19-23. T.T.'s testimony, unrefuted by the District, is that she first became aware that the District could have assessed N.N. for special education and that she had a right to request a due process hearing in May 2018, after she spoke with her attorney. *See* AR 1780:2-5; *see also* AR 116, 177 (plaintiffs' administrative briefing stating that the earliest plaintiffs were aware of their IDEA rights was April 30, 2018 or May 2018). Plaintiffs' claims are not time-barred, as their March 18, 2020 due process complaint timely was filed within two years from May 1, 2018.

## **2. Responsibility for N.N. after August 2018 enrollment at TFHS**

24 The District contends that it ceased to be the local education agency (“LEA”) responsible  
25 for N.N. after August 2018 when she enrolled in TFHS. Plaintiffs assert, and the District does not  
26 deny, that the District never disclaimed responsibility as N.N.’s LEA until just two weeks prior to  
27 the June 2020 administrative due process hearing. Plaintiffs maintain that as N.N.’s district of  
28 residence, the District’s IDEA obligations to N.N. were ongoing and that the District remained

1 responsible for offering her a FAPE even after August 2018. For the reasons discussed below,  
2 plaintiffs are correct.

3 This case presents a somewhat unusual situation where, as part of her placement at  
4 Explorations, N.N. received a public school education in an out-of-state school district.  
5 Nevertheless, courts have held that in cases where a student who is or should have been identified  
6 as needing a special education assessment is enrolled in an out-of-district school, the school  
7 district's IDEA obligations are based on "where the student resides, rather than where the student  
8 is currently enrolled in school." *R.B. v. North East Indep. Sch. Dist.*, No. SA-20-CV-01441-JKP,  
9 2022 WL 488500, at \*10 (W.D. Tex. Feb. 16, 2022); *see also Dist. of Columbia v. Abramson*, 493  
10 F. Supp.2d 80, 85 (D.D.C. 2007) ("Just because Connecticut may have child find responsibilities  
11 of its own and just because [student] is currently enrolled in school in Connecticut does not relieve  
12 [the school district] from having to fulfill its own responsibilities as the LEA of residence to  
13 evaluate the student and make FAPE available."); *S.B. v. San Mateo Foster City Sch. Dist.*, No.  
14 16-cv-01789-EDL, 2017 WL 4856868, at \*17 (N.D. Cal. Apr. 11, 2017) ("Abramson indicates  
15 that what matters in determining the district's ongoing responsibilities is where the child resides,  
16 rather than where they are currently enrolled in school."). Insofar as the District contends that it  
17 ceased to be N.N.'s responsible LEA based on her enrollment in TFHS, its arguments are contrary  
18 to authority indicating that the focus should be on N.N.'s residency.<sup>20</sup>

19 A school district's child find obligations under the IDEA extend to "[a]ll children with  
20 disabilities residing in the State[.]" 20 U.S.C. § 1412(a)(3)(A). "California has adopted a  
21 comprehensive statutory scheme to conform California special education law to the requirements  
22 of the IDEA" *B.H. v. Manhattan Beach Unified Sch. Dist.*, 35 Cal. App. 5th 563, 571 (2019).  
23 California law determines which LEA is responsible for the provision of a FAPE and preparation

25 \_\_\_\_\_  
26 <sup>20</sup> The District misplaces its reliance on the administrative decisions in *Bellflower Unified Sch.*  
27 *Dist. v. Cal. State Educational Agency*, (OAH 2018) Case No. 2018070037, 74 IDELR 274 and  
28 *Parent on Behalf of Student v. Arcadia Unified Sch. Dist.* (OAH 2014), Case No. 2014060827,  
114 LRP 44606. In *Bellflower*, the parent moved her residence outside the district. Both  
*Bellflower* and *Arcadia* concerned California Virtual Academy ("CAVA") schools, which by  
statute are charter schools that present a specific exception to the general residency rule under  
California law. See Cal. Educ. Code §§ 47641, 47646.

1 of an IEP. *Id.* Under California law, “[t]he determination of the responsible LEA is usually a  
2 function of the parent’s residency.” *Id.* Residency under the IDEA and the California Education  
3 Code is no “different from the ordinary determination of residency.” *Union Sch. Dist. v. Smith*, 15  
4 F.3d 1519, 1525 (9th Cir. 1994) (concluding that the district where student’s family maintained  
5 their permanent residence, worked and paid taxes, was responsible for student’s special  
6 education). “Generally, elementary and secondary school students must attend school in the  
7 district in which their parent or legal guardian resides, and that school district is the appropriate  
8 LEA.” *B.H.*, 35 Cal. App. 5th at 571; *see also* Cal. Educ. Code §§ 48200, 56028.

9 Here, it is undisputed that at all times T.T. maintained her permanent residence within the  
10 District. The District nonetheless argues that after August 2018, N.N. resided in Montana with  
11 Ms. James, who signed some TFHS school forms as N.N.’s “guardian.” *See* Dkt. No. 59 at 16  
12 (citing AR 1039; 1044). Ms. James also testified that Explorations obtains documentation from  
13 parents that she described as a “kind of a program and activity consent” allowing Explorations “to  
14 be in that role for parents while they’re not here.” AR 2215:3-6. However, the District fails to  
15 cite any authority supporting the proposition that Ms. James is N.N.’s “parent” or “legal guardian”  
16 for purposes of determining N.N.’s responsible LEA. “Parent,” as defined in a section of the  
17 California Education Code concerning special education, includes “[a] guardian generally  
18 authorized to act as the child’s parent, or authorized to make educational decisions for the child[.]”  
19 Cal. Educ. Code § 56028(a)(3); *see Orange Cnty. Dep’t of Educ. v. Cal. Dep’t of Educ.*, 668 F.3d  
20 1052, 1056 (9th Cir. 2011) (“[T]he definition of parent in [§] 56028 indisputably applies to  
21 [§] 48200, at least under some circumstances.”). The District does not appear to claim that Ms.  
22 James was N.N.’s “parent” under § 56028 (or any other authority); and, even if it did, § 56028  
23 expressly provides that when more than one person qualifies to act as a parent, “the biological or  
24 adoptive parent . . . shall be presumed to be the parent for purposes of this section unless the  
25 biological or adoptive parent does not have legal authority to make educational decisions for the  
26 child.” Cal. Educ. Code § 56028(b)(1).

27 There is no indication that T.T.’s parental rights were ever terminated or that she ceded  
28 such rights, including educational rights, to Ms. James. To the contrary, T.T. testified that she did

1 not grant Ms. James, or anyone else, the right to make educational decisions for N.N.  
 2 AR 2454:22-24. Ms. James also testified that T.T. never assigned any parental rights to Ms.  
 3 James, and that Ms. James enrolled N.N. at TFHS only with T.T.'s permission. *See* AR 2238:16-  
 4 25, 2247:14-22. Additionally, the TFHS enrollment form cited by the District identifies T.T. as  
 5 N.N.'s "Mother" and "Guardian" with "Legal Custody" over N.N. *See* AR 1039.

6 The Court concludes that the District remained N.N.'s LEA and that its IDEA obligations  
 7 to N.N. were ongoing through the 2018-2019 and 2019-2020 school years.

8           **C. Whether the District Denied N.N. a FAPE by Failing to Identify Her as a  
 9 Student Eligible for Special Education and Offering an IEP during the 2017-  
   2018 School Year**

10           In evaluating whether N.N. was denied a FAPE during her sophomore year at LAHS, the  
 11 ALJ focused exclusively on events following T.T.'s May 1, 2018 request for a special education  
 12 assessment.<sup>21</sup> Although he found that the District's "assessment plan was three days late," he  
 13 concluded that N.N. "did not prove any delay by [the District] in conducting an assessment after  
 14 [T.T.]'s May 1, 2018 request resulted in a denial of a FAPE to [N.N.]." AR 1072, 1073. The ALJ  
 15 found that the District appropriately assessed N.N. as ineligible for special education at the  
 16 September 2018 and May 2019 IEP meetings. He further explained that "even if there was a  
 17 procedural violation of three days," that delay "did not impede [N.N.]'s right to a FAPE or cause a  
 18 deprivation of educational benefits, nor did it impede [T.T.]'s opportunity to participate in the  
 19 decision-making process, because [N.N.] was not eligible for special education." AR 1073.

20           Plaintiffs contend that the District's child find obligation was triggered by at least October  
 21 2017, when T.T. provided Mr. Rosenberg with the letter from N.N.'s pediatrician, who diagnosed  
 22 N.N. with anxiety and stated that "this medical diagnosis is significant enough that it might require  
 23 special accommodations in her educational program." Dkt. No. 55 at 10; AR 275-76; 279;  
 24 1804:21-24. Plaintiffs acknowledge that "[a] child find violation is a procedural violation of the  
 25 IDEA that can result in a substantive denial of a FAPE only if the student ultimately would have

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27           <sup>21</sup> As noted above, the ALJ's decision characterized the first issue for decision as whether the  
 28 District denied N.N. a FAPE by failing to timely respond to T.T.'s May 2018 request for an  
       assessment. AR 1069.

1 been found eligible for special education.” Dkt. No. 55 at 12; *see also R.B.*, 496 F.3d at 942 (“A  
2 child ineligible for IDEA opportunities in the first instance cannot lose those opportunities merely  
3 because a procedural violation takes place. . . . In other words, a procedural violation cannot  
4 qualify an otherwise ineligible student for IDEA relief.”). However, plaintiffs maintain that N.N.  
5 would have qualified for special education under the categories of emotional disturbance, other  
6 health impairment and specific learning disability, had the District timely assessed her during the  
7 2017-2018 school year. Dkt. No. 55 at 13-18; Dkt. No. 61 at 6. They contend that, at the very  
8 least, alternative educational possibilities would have been better considered if the District timely  
9 had complied with its child find obligation. Dkt. No. 55 at 21-22.

10 The District maintains that its child find obligation was not triggered at any time during the  
11 2017-2018 school year prior to T.T.’s May 1, 2018 request for a special education assessment.  
12 The District further contends that even if there was a child find violation, any such procedural  
13 violation did not result in the denial of a FAPE because N.N. did not require special education.  
14 *See* Dkt. No. 59 at 11, 14.

15 For the reasons discussed below, the Court agrees with plaintiffs that the ALJ erred in  
16 limiting his analysis to the period after May 1, 2018 and failing to evaluate the District’s  
17 obligations to N.N. throughout her sophomore year at LAHS. His conclusion that the District’s  
18 failure to satisfy its child find obligation did not result in the denial of a FAPE to N.N. for the  
19 2017-2018 school year deserves no deference.

## 20 1. The IDEA’s child find obligation

21 The IDEA’s child find provision requires a school district to identify all students who may  
22 need evaluation for special education and related services. 20 U.S.C. § 1412(a)(3)(A). This  
23 obligation extends to students who are suspected of having a disability, even if the students  
24 advance from grade to grade. *Id.*; 34 C.F.R. § 300.111; *S.B.*, 2017 WL 4856868 at \*13.

25 “In order to ensure that children with disabilities receive an appropriate education tailored  
26 to their unique condition, the IDEA requires that when a school district is afforded reason to  
27 suspect that a child has a disability, it ‘conduct a full and individual initial evaluation’ that ensures  
28 the child is assessed for ‘all areas of suspected disability,’ using a variety of reliable and

1 technically sound instruments.” *Timothy O.*, 822 F.3d at 1109 (quoting 20 U.S.C. §§ 1414(a)(1),  
2 (b)(2)-(3)). “Accordingly, the IDEA requires that every State have procedures in place that are  
3 designed to identify children who may need special education services.” *Id.* at 1110 (citing 20  
4 U.S.C. § 1412(a)(3)(A)). “Once identified, those children must be evaluated and assessed for all  
5 suspected disabilities so that the school district can begin the process of determining what special  
6 education and related services will address the child’s individual needs.” *Id.* (citing 20 U.S.C.  
7 §§ 1412(a)(7), 1414(a)-(c)); *see also S.B.*, 2017 WL 4856868 at \*13 (“Once a child is identified as  
8 potentially in need of specialized instruction and services, the district must conduct an initial  
9 evaluation to confirm the child’s eligibility for special education.”); 20 U.S.C. § 1414(a)(1); 34  
10 C.F.R. § 300.301; Cal. Educ. Code, § 56302.1. Either a parent or school district may initiate a  
11 request for an initial evaluation. 34 C.F.R. § 300.301(b).

12 The child find obligation is triggered when the school district “has reason to suspect a  
13 disability, and reason to suspect that special education services may be needed to address that  
14 disability.” *See Dep’t of Educ. of State of Hawaii v. Cari Rae S.*, 158 F. Supp.2d 1190, 1194 (D.  
15 Haw. 2001) (internal quotations and citation omitted); *S.B.*, 2017 WL 4856868 at \*13. The Ninth  
16 Circuit has noted “that a disability is ‘suspected,’ and therefore must be assessed by a school  
17 district, when the district has notice that the child has displayed symptoms of that disability.”  
18 *Timothy O.*, 822 F.3d at 1119; *see also Simmons v. Pittsburg Unified Sch. Dist.*, No. 4:13-cv-  
19 04446-KAW, 2014 WL 2738214, at \*6 (N.D. Cal. June 11, 2014) (“The state has reason to  
20 suspect that a child may have a disability where: (1) there is a suspicion that a student has an  
21 impairment that is affecting the student’s educational performance or (2) a parent requests special  
22 education services or an assessment of eligibility for special education services.”). For example,  
23 parents’ “informed suspicions” may trigger a school district’s child find obligation, even where  
24 the school district disagrees with those suspicions. *Timothy O.*, 833 F.3d at 1120 (quoting  
25 *Pasatiempo by Pasatiempo v. Aizawa*, 103 F.3d 796, 802 (9th Cir. 1996)). Thus, “if a school  
26 district is on notice that a child may have a particular disorder, it *must* assess that child for that  
27 disorder, regardless of the subjective views of its staff members concerning the likely outcome of  
28 such an assessment.” *Id.* at 1121. Courts within the Ninth Circuit have described the threshold for

1 suspecting that a child has a disability as “relatively low.” *See Cari Rae S.*, 158 F. Supp. 2d at  
2 1195 (noting the unchallenged observations of the hearing officer “that the threshold for  
3 ‘suspicion’ is relatively low, and that the inquiry was not whether or not [the student] actually  
4 *qualified* for services, but rather, was whether she should be *referred* for an evaluation.”).  
5 “Whether a school district had reason to suspect that a child may have a disability must be  
6 evaluated in light of the information the district knew, or had reason to know, at the relevant time,  
7 not in hindsight.” *Simmons*, 2014 WL 2738214 at \*6; *see also L.J.*, 850 F.3d at 1004 (“The  
8 appropriateness of a student’s eligibility should be assessed in terms of its appropriateness at the  
9 time of the child’s evaluation and not from the perspective of a later time with the benefit of  
10 hindsight.”) (citing *Adams v. Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999)).

11 On October 5, 2017, shortly before her October 26, 2017 email to Mr. Rosenberg  
12 appending the anxiety diagnosis by N.N.’s pediatrician, T.T. advised Mr. Rosenberg that N.N. “is  
13 feeling extremely overwhelm [sic] with the transition of 9th grade to 10th grade. She has stressed  
14 to her therapist and tutor this feeling of not being able to catch up or enough time because of a lot  
15 of homework.” AR 277. T.T. previously informed the District, at the end of N.N.’s freshman  
16 year, that N.N. had been “going through a very difficult and emotional period recently.” *Id.*  
17 While the District points out that N.N. finished her freshman year at LAHS with a 3.0 grade point  
18 average (*see AR 297*), in the first quarter of her sophomore year, N.N. was getting a B+ in  
19 chemistry, a D in algebra II, a D- in AP human geography, a C in Spanish and an F in honors  
20 world literature. AR 482. At the administrative hearing, Mr. Rosenberg acknowledged that  
21 “[t]here was a pretty dramatic change in [N.N.’s] performance from freshman to sophomore year”  
22 and that “it was evident by October.” AR 1209:3-5; *see also AR 297*. At that time, the District  
23 did not refer N.N. for a special education assessment and instead developed a 504 plan that  
24 provided accommodations for extra time on assignments and tests, the opportunity to test in a  
25 separate space, and monthly meetings with teachers. AR 281. The District’s 504 plan expressly  
26 identified N.N.’s disability as “[a]nxiety” and noted that “[a]nxiety limits learning.” *Id.*

27 The District argues that it met its child find obligation by promptly convening a meeting in  
28 November 2017 and developing a 504 plan, and further suggests that under the circumstances it

1 was reasonable for the District to first proceed with a 504 plan to see if the accommodations  
2 worked. Dkt. No. 59 at 12. Additionally, the District asserts that to avoid “over-identifying”  
3 students as disabled, it is required under the IDEA and California Education Code § 56303 to use  
4 general education resources, where appropriate. *See* Dkt. No. 59 at 9 (citing *Los Angeles Unified*  
5 *Sch. Dist.*, 548 F. Supp. 2d 815, 819-20 (C.D. Cal. 2008)). However, adopting a 504 plan and  
6 implementing accommodations does not satisfy a school district’s obligations to conduct a special  
7 education assessment under the IDEA. While a school district must use regular education  
8 resources, where appropriate, to address a student’s exceptional needs, it cannot delay an  
9 *assessment* of the student’s needs on that basis. *See, e.g., Simmons*, 2014 WL 2738214 at \*9  
10 (noting with approval the ALJ’s acknowledgement that while ““a district is required to utilize the  
11 resources of its regular education program, where appropriate, to address a student’s exceptional  
12 needs, it may not delay its assessment of a student with a suspected disability on the basis that it is  
13 utilizing a response to intervention approach to accommodate the student in a regular education  
14 program.””). To the extent the District suggests that state law requires otherwise, the District is  
15 correct that California law states that “[a] pupil shall be *referred* for special educational instruction  
16 and services *only after* the resources of the regular education program have been considered and,  
17 where appropriate, utilized.” Cal. Educ. Code § 56303 (emphasis added). That statute, however,  
18 does not appear to address special education assessments. In any event, state law cannot override  
19 the IDEA’s requirements regarding the District’s child find obligation. *See J.L.*, 592 F.3d at 947.

20 Nor is the District relieved of its duty to assess N.N. based on Mr. Rosenberg’s opinion  
21 that the 504 plan was appropriate for her. Although N.N.’s 504 plan expressly identifies N.N.’s  
22 disability as “[a]nxiety” and states that “[a]nxiety limits learning” (AR 281), Mr. Rosenberg  
23 testified that this is merely “boilerplate” language that the District “use[s] to drive a student to—  
24 appropriately served by 504 accommodations.” AR 281, 1224:5-10. Noting that LAHS has “at  
25 least tens of students with similar sorts of challenges,” i.e., “a diagnosis of anxiety [that] appears  
26 to be affecting their schoolwork,” Mr. Rosenberg stated that “the first step in terms of addressing  
27 that student’s needs is creating a 504 plan” and that “[o]n almost all bases, the 504 plan is  
28 sufficient for the student’s needs.” AR 1224:16-18; 1287:4-5. Further, Mr. Rosenberg testified

1 that in his experience, challenges that “appear[] to be conflict at home and the associated issues”  
2 are “situational” and could be addressed without the need for special education services.  
3 AR 1264:19-1265:2. However, LAHS was not free to disregard its obligation to assess N.N. for  
4 special education services once it had reason to believe that N.N. suffered from a disability that  
5 impacted her ability to access her education. “School districts cannot circumvent th[eir]  
6 responsibility [to assess a student with a suspected disability] by way of informal observations, nor  
7 can the subjective opinion of a staff member dispel such reported suspicion.” *Timothy O.*, 822  
8 F.3d at 1119. At the administrative hearing Mr. Rosenberg acknowledged that the decline in  
9 N.N.’s academic performance was “significant,” that “it was evident by October,” and that  
10 “whatever the source of the anxiety was . . . it was, in fact, affecting her performance.”  
11 AR 1209:3-5; 1219:22-1220:1.

12 The District asserts that it also offered N.N. “school-based therapy, a support offered to all  
13 general education students,” which plaintiffs reportedly “declined.” Dkt. No. 59 at 12. The record  
14 indicates that this offer of “school-based therapy” consisted of informing T.T. of the name of a  
15 school nurse and a school therapist that N.N. could reach out to if she felt overwhelmed at school.  
16 AR 1204:14-18; 1228:10-21, 1279:1-11; 1793:7-1794:2; 1808:7-25. Although it is unclear  
17 whether N.N. actually used these resources, there is no indication that plaintiffs “declined” these  
18 services. In any event, the District cites no authority for the proposition that offering such  
19 supports obviates the duty to assess a student with a suspected disability.

20 Even if it might have been reasonable for the District to wait *some* period of time to see if  
21 the 504 plan accommodations were effective, the record indicates that the District had ample  
22 information by March 2018 to suspect that N.N. had a disability requiring an assessment. By that  
23 time, N.N.’s 504 plan accommodations had been in place for about 4 months, yet her grades  
24 continued to decline, she dropped her second world literature course, her teachers noted that she  
25 was regularly leaving class and expressed concern about her declining academic performance, and  
26 her mother had enrolled her in intensive outpatient treatment at CHC. AR 967-969; 998-1000;  
27 1824:16-19. *See, e.g.*, *S.B.*, 2017 WL 4856868 at \*14 (concluding that the school district violated  
28 its child find obligation when it failed to assess student, even after they knew of student’s ADHD

1 diagnosis, student's teacher expressed concerns about focus issues, and parents notified the school  
2 that they were having student assessed for "latent learning disabilities.").

3 The District points out that Ms. Mark, N.N.'s (second) world literature teacher, testified  
4 that she never considered referring N.N. for special education services because Ms. Mark did not  
5 believe N.N. "was struggling because of a learning disability." AR 1325:11-16. Similarly, the  
6 District notes that N.N.'s chemistry teacher, Ms. Mattson, did not believe that N.N.'s anxiety  
7 affected her performance because "her homework still showed that she had a solid understanding.  
8 Her test and quizzes decreased but were in normal range." AR 1351:7-9. And N.N.'s Spanish  
9 teacher, Mr. Murillo, testified that he felt N.N. "was able to do . . . the work. When she put her  
10 head to it—when she sat down and actually delivered[.]" AR 1372:20-22. However, the  
11 District's obligations under the IDEA extend to "a wide spectrum" of disabled students, including  
12 those like N.N. whose disability is not primarily cognitive, but emotional or psychological.  
13 *Rowley*, 458 U.S. at 202. As discussed above, the record amply demonstrates that N.N.'s anxiety  
14 was significantly impacting her school attendance and performance.

15 The District notes that Ms. Leydecker, N.N.'s CHC therapist, also did not refer N.N. for  
16 special education services and testified that if she determined that a student's mental health was  
17 interfering with their education, she (like the District) "would discuss a 504 plan" and then would  
18 discuss special education services if the 504 plan did not meet the student's needs. AR 1469:13-  
19 20. However, Ms. Leydecker explained that she did not tell T.T. to request a special education  
20 evaluation because CHC's priority is to stabilize a child's mental health, and CHC refers families  
21 back to the school for "school-based things[.]" AR 1475:21-1476:7. While Ms. Leydecker  
22 acknowledged that "a lower level" of anxiety or depression might be addressed with a 504 plan,  
23 she testified that she considered N.N.'s needs to be "high-risk." AR 1452:2-11; 1468:18-25.

24 In any event, the District does not seriously dispute that it failed to timely develop an  
25 assessment plan in response to T.T.'s May 1, 2018 email requesting an assessment. Unless a  
26 student's parent or guardian agrees in writing to an extension, California law requires the District  
27 to develop a proposed assessment plan "within 15 calendar days of referral for assessment, not  
28 counting calendar days between the pupil's regular school sessions or terms or calendar days of

1 school vacation in excess of five schooldays[.]” Cal. Educ. Code § 56043(a). In view of T.T.’s  
2 May 1, 2018 request for an assessment (AR 963-64), the District had until Wednesday, May 16,  
3 2018 to develop an assessment plan. It is unclear exactly when the District provided its plan to  
4 T.T.; the only confirmation in the record is Ms. English’s Friday, May 18, 2018 email to T.T.  
5 stating that the plan had been mailed to her that week. AR 963. The ALJ concluded that the  
6 District’s plan was three days late (AR 1072); the District seems to contend that its assessment  
7 plan was, at most, one day late (Dkt. No. 59 at 14).<sup>22</sup>

8 In sum, the preponderance of evidence reflects that the District was on notice by at least  
9 November 2017, and certainly no later than March 2018, that N.N. might have a disability  
10 requiring an assessment. The District unreasonably delayed undertaking a special education  
11 assessment of N.N.

## 12 2. Denial of a FAPE

13 Whether the District provided an assessment plan one day or three days late, by reference  
14 to T.T.’s May 1, 2018 request, or several months late, the parties appear to agree that the delay is a  
15 procedural misstep that, in and of itself, is not actionable unless it resulted in a denial of a FAPE.  
16 See Dkt. No. 55 at 12; Dkt. No. 59 at 14. “A child is denied a FAPE when procedural  
17 inadequacies result in the loss of an educational opportunity, or seriously infringe on the parents’  
18 opportunity to participate in the IEP formulation process.” *L.J.*, 850 F.3d at 1003 (citing *Doug C.*  
19 v. Hawaii Dep’t of Educ., 720 F.3d 1038, 1043 (9th Cir. 2013)). “A procedural error is harmless if  
20 the student is substantively ineligible for IDEA benefits.” *Id.* (citing *R.B.*, 496 F.3d at 942).

21 The ALJ concluded that the District’s untimely provision of an assessment plan was a  
22 harmless error and did not result in the denial of a FAPE because N.N. was not eligible for special  
23 education services. AR 1073. For that reason, the District argues that the ALJ’s conclusion  
24 should be affirmed. See Dkt. No. 59 at 14, 15. As discussed above, however, in addressing this

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25  
26 <sup>22</sup> Here, the District argues that because T.T. did not request an assessment until 9:26 p.m. on May  
27 1, 2018, the District did not actually receive the request until May 2, 2018, and therefore had until  
28 May 17, 2018 to develop an assessment plan. Dkt. No. 59 at 14. The District has cited no  
authority indicating that the lateness of the hour at which T.T. sent her request extended the 15-  
day period for providing an assessment plan. In any event, Ms. English responded to T.T.’s May  
1, 2018 email that same night. AR 963.

1 issue the ALJ did not consider all the evidence relevant to the 2017-2018 school year. Moreover,  
2 he improperly based his conclusion on the perspective of a later time and with the benefit of the  
3 hindsight observation that N.N. “was appropriately assessed and was not eligible for special  
4 education at the September 2018 IEP, and again at the May 2019 IEP.” AR 1073.

5 “[T]o succeed on a claim that a child was denied a free appropriate public education  
6 because of a procedural error, the individual need not definitively show that his educational  
7 placement would have been different without the error.” *Timothy O.*, 822 F.3d at 1124. “A loss of  
8 an educational opportunity occurs, for example, when there is a ‘strong likelihood’ that, but for the  
9 procedural error, an alternative placement ‘would have been better considered.’” *Id.* (quoting  
10 *Doug C.*, 720 F.3d at 1047); *see also L.J.*, 850 F.3d at 1008 (“Here, there is reason to believe that  
11 alternative services would have at least been more seriously considered during the IEP process if  
12 the School District had assessed L.J.’s health, including the effects of his medication on his  
13 health.”).

14 Here, the record demonstrates that by March 2018, there is reason to believe that  
15 alternative services would at least have been more seriously considered if the District had timely  
16 assessed N.N. The District does not offer any argument disputing that by at least the spring of  
17 2018, N.N. had been diagnosed with major depression and anxiety. *See Dkt. No. 59 at 11-15.* As  
18 discussed above, the overwhelming evidence is that N.N. was not making meaningful academic  
19 progress at LAHS, even with the accommodations provided in the District’s 504 plan. Over the  
20 course of her sophomore year, N.N.’s grades declined, and as noted by teachers, she was not  
21 engaging in the material, was missing class, and was essentially failing her courses. *See AR 967-*  
22 *969, 998-1000.* The District failed to timely consider the merits of continuing with the District’s  
23 504 plan or whether alternative services were needed, and therefore denied N.N. a FAPE for the  
24 2017-2018 school year.

25 **D. Whether the District Failed to Conduct an Appropriate Psychoeducational  
26 Evaluation**

27 The ALJ found that plaintiffs did not establish that the District’s psychoeducational  
28 evaluation was inappropriate. AR 1073-84. After reviewing Dr. Nutter’s analysis, the ALJ

1 concluded that her evaluation “met the legal requirements to evaluate [N.N.] for her possible  
2 eligibility for special education under the three categories of suspected disability and provided a  
3 solid foundation for the IEP teams’ later determination that [N.N.] was not eligible for special  
4 education.” AR 1084.

5 Plaintiffs contend that the District’s initial 2018 psychoeducational evaluation of N.N. was  
6 inadequate—specifically, with respect to Dr. Nutter’s assessment of N.N.’s emotional functioning.  
7 Chief among plaintiffs’ complaints is that Dr. Nutter did not conduct a classroom observation of  
8 N.N. and did not interview N.N.’s past and present teachers and her then-current Explorations  
9 therapist, Mr. Boudousquie. *See* Dkt. No. 55 at 22-23; Dkt. No. 61 at 11-12. Plaintiffs also  
10 challenge the appropriateness of certain rating scales that Dr. Nutter used and contend that she  
11 should have employed projective measures of N.N.’s emotional functioning. While plaintiffs  
12 appear to acknowledge that the failure to properly conduct an appropriate assessment is a  
13 procedural violation of the IDEA, *see Park*, 464 F.3d at 1031-33, they contend that the District’s  
14 allegedly inadequate assessment “was a direct causal factor in its erroneous determination that  
15 N.N. was not eligible for special education, which in turn impeded her right to a FAPE.” Dkt. No.  
16 55 at 23.

17 The Court addresses here plaintiffs’ arguments regarding the conduct of Dr. Nutter’s  
18 assessment. To the extent the parties dispute Dr. Nutter’s ultimate conclusion that N.N. was not  
19 eligible for special education and related services, those arguments are addressed below.

20 “Under the IDEA, the school district must conduct a ‘full and individual initial evaluation,’  
21 one which ensures that the child is assessed in ‘all areas of suspected disability,’ before providing  
22 that child with any special education services.” *Timothy O.*, 822 F.3d at 1119 (quoting 20 U.S.C.  
23 §§ 1414(a)(1)(A), 1414(b)(3)(B)). “The California Education Code, which incorporates the  
24 requirements of the IDEA into state law, similarly requires that the child be assessed ‘in all areas  
25 related to the suspected disability.’” *Id.* (quoting Cal. Educ. Code § 56320(f)). “[T]his  
26 requirement serves a critical purpose: it allows the child’s IEP Team to have a complete picture of  
27 the child’s functional, developmental, and academic needs, which in turn allows the team to  
28 design an individualized and appropriate educational plan tailored to the needs of the individual

1 child.” *Id.*

2 The IDEA and its accompanying regulations “contain an extensive set of procedural  
3 requirements that are designed to ensure that this initial evaluation (as well as any subsequent  
4 reevaluations) achieves a complete result that can be reliably used to create an appropriate and  
5 individualized educational plan tailored to the needs of the child.” *Id.* at 1110. “First, the initial  
6 evaluation must be designed not only to determine whether the child has a disability, but also ‘to  
7 gather relevant functional, developmental, and academic information about the child,’ that can be  
8 used to determine the child’s individual educational needs.” *Id.* at 1111 (quoting 34 C.F.R.  
9 § 300.304(b)(1); 20 U.S.C. § 1414(a)(1)(C)). Second, school districts must provide parents with  
10 notice describing any proposed evaluation procedures that the district proposes to conduct and  
11 why the district has made those decisions. *Id.* Further, in conducting the evaluation, school  
12 districts must:

- 13 1. Use a “variety of assessment tools and strategies” without relying  
14 on “any single measure or assessment as the sole criterion for  
15 determining whether a child is a child with a disability or determining  
16 an appropriate educational program for the child,” 20 U.S.C.  
17 § 1414(b)(2)(A) & (B);  
18 2. Use “technically sound instruments that may assess the relative  
19 contribution of cognitive and behavioral factors, in addition to  
20 physical or developmental factors,” *id.* § 1414(b)(2)(C); and  
21 3. Ensure that all assessments are conducted by trained and  
22 knowledgeable personnel, in accordance with instructions provided  
23 by the producer of the assessment, and for purposes which the  
24 assessments or measures are valid and reliable, *id.* § 1414(b)(3)(A).

25 *Id.*

26 In his decision, the ALJ noted the information Dr. Nutter considered in performing her  
27 assessment:

28 Dr. Nutter completed her report of her evaluation on  
September 13, 2018. The report was based upon her review of  
available records, teacher reports, her in-person testing in Montana,  
observation, an interview with [N.N.], Parent input, information  
from [TFHS], the Explorations program, the Second Nature  
wilderness program, and the use of standardized assessment  
measures. She also considered [N.N.]’s academic testing completed  
by Erica Starks, a [District] special education teacher.

\* \* \*

Dr. Nutter gathered information from [T.T.] She reviewed [N.N.]'s available educational records from [the District] for grades seven and later, as prior years had been sent to Montana as part of [N.N.]'s cumulative file. She reviewed and summarized records from an intensive outpatient program that [N.N.] attended for approximately six weeks from March 12, 2018 through April 30, 2018. She reviewed and summarized a report, dated August 17, 2018, from Dr. Coady Schueler, the psychologist who treated [N.N.] at the Second Nature program. She summarized her interviews with director Penny James from Explorations, and principal Rich Ferris from [TFHS]. Dr. Nutter also observed [N.N.] during her eight hours of interview, observation, and testing that she conducted at Explorations in Montana on August 24, 2018.

AR 1076, 1077; *see also* 337-358; 1511:17-23; 1512:23-1515:25; 1662:10-19. There is no serious dispute about the information Dr. Nutter did and did not obtain as part of her evaluation.<sup>23</sup> The ALJ, however, did not address plaintiffs' arguments that Dr. Nutter should have gathered additional information, including classroom observation of N.N., information from her teachers at LAHS and at TFHS, and information from Mr. Boudousquie at Explorations.

In relevant part, the IDEA and accompanying regulations require that as part of an initial evaluation, the IEP team and other qualified professionals, “*as appropriate*,” must “[r]eview *existing* evaluation data on the child, including . . . classroom-based observations and . . . [o]bservations by teachers and related services providers[.]” 20 U.S.C. § 1414(c)(1)(A)(ii), (iii); 34 C.F.R. § 300.305(a)(1)(ii), (iii) (emphasis added). With respect to classroom observation of N.N., when Dr. Nutter tested and observed her on August 24-25, 2018, school was not yet in session. AR 337; 1511:1-2; 1662:15-16. The Court is not persuaded that Dr. Nutter should have delayed her assessment in order to observe N.N. in a classroom setting at TFHS, particularly in view of T.T.’s June 14, 2018 consent to the District’s assessment plan and the District’s obligation to timely complete its assessment and hold an IEP meeting within 60 days (excluding days

<sup>23</sup> The Court is unpersuaded by plaintiffs' argument that the ALJ "clearly erred" in stating that Dr. Nutter's evaluation included "teacher reports" and "observation." See Dkt. No. 55 at 22 n.5. Dr. Nutter did observe N.N. While the ALJ's reference to "teacher reports" is vague, on the record presented, the Court is not prepared to find that he "clearly erred" in saying that Dr. Nutter considered such reports as part of her assessment. Dr. Nutter did review N.N.'s school records, and she testified that she spoke to Mr. Ferris, who in turn had "gathered teacher reports." AR 1645:3-11; see also AR 1755:20-21.

1 between school sessions and absent exceptions, such as the parent’s agreement to an extension).  
2 *See generally* 20 U.S.C. § 1414(a)(1)(C)(i)(I); Cal. Educ. Code § 56043(c), (f)(1); § 56302.1; *see*  
3 *also M.M. v. Lafayette Sch. Dist.*, 767 F.3d 842, 853 (9th Cir. 2014) (finding that the school  
4 district did not procedurally violate the IDEA in failing to review certain data in its initial  
5 evaluation, noting that “[t]he qualifier ‘if appropriate,’ negates an express statutory requirement to  
6 review existing evaluation data as a part of the initial evaluation.”). Additionally, when asked at  
7 the administrative hearing why she did not obtain rating scales from N.N.’s teachers at TFHS, Dr.  
8 Nutter testified that at that time, N.N.’s teachers had not known her long enough to provide a  
9 reasonable assessment. *See* AR 1604:15-19 (“They have not known N.N. long enough. Well, first  
10 of all, when I started the assessment, she wasn’t in school. Second, there has to be a reasonable  
11 amount of knowledge of the student. And less than a month is not considered reasonable.”).  
12 Plaintiffs have not provided a basis to question Dr. Nutter’s professional judgment on that point.

13 Plaintiffs argue that Dr. Nutter should have obtained information from N.N.’s teachers at  
14 LAHS, noting that they had serious concerns about N.N.’s attendance, classroom participation,  
15 and grades during the 2017-2018 school year, and that such information was relevant to N.N.’s  
16 performance in the general education setting. *See* AR 968-970; 997-1000. Plaintiffs correctly  
17 note that information about a student’s past behavior appropriately is part of the “snapshot” that a  
18 school district should consider. *See Tamalpais Union High Sch. Dist. v. D.W.*, 271 F. Supp. 3d  
19 1152, 1160 (N.D. Cal. 2017). However, plaintiffs point to no particular information or feedback  
20 from N.N.’s LAHS teachers that is not already reflected in Dr. Nutter’s report. Indeed, in  
21 discussing N.N.’s social and academic history, Dr. Nutter specifically noted that “[s]ophomore  
22 year was challenging for [N.N.], emotionally and academically”; that “[h]er interest in school  
23 declined significantly”; and that N.N. ended the first semester with a 1.5 grade point average.  
24 AR 339. Dr. Nutter further noted that N.N. “continued to struggle throughout second semester.  
25 Her academic disengagement increased; she’d leave class for several minutes at a time, missing  
26 key information. Her work completion declined significantly and her use of drugs continued.” *Id.*  
27 At the due process hearing, Dr. Nutter testified that additional information from N.N.’s LAHS  
28 teachers would not have been helpful to her report because Dr. Nutter “had enough history to

1 understand what [N.N] looked like” and that the information that Dr. Nutter received from Mr.  
2 Rosenberg, T.T., and N.N. “was all consistent.” AR 1645:15-20. Plaintiffs have presented no  
3 evidence to the contrary.

4 Relying on Dr. Solomon’s testimony at the July 2021 evidentiary hearing, plaintiffs  
5 contend that Dr. Nutter’s assessment was “fatal[ly] flaw[ed]” because she did not use projective  
6 measures of N.N.’s emotional functioning, and the only semi-projective measure used (the  
7 “incomplete sentences” test) was not referenced in Dr. Nutter’s report. Dkt. No. 61 at 11. Dr.  
8 Solomon’s testimony, however, does not bear the weight that plaintiffs place upon it. Dr.  
9 Solomon testified that compared to rating scales (where test subjects respond by choosing from  
10 among a pre-defined set of answers), more open-ended projective measures (such as interpreting  
11 pictures or ink blots) make it harder for test subjects to fake responses that may, for example,  
12 suggest that the test subject is functioning better than they actually are. Additionally, Dr. Solomon  
13 noted that testing standards require that all tests that are administered should be included in the  
14 report. Dkt. No. 57 at 13:2-15:21; 17:11-16; 17:22-18:2; 20:20-25. However, Dr. Solomon also  
15 testified that she has “no problem with rating scales,” noting that “they provide quantitative data,  
16 and everybody likes that. They produce numbers. So we all use them. They’re perfectly  
17 useable.” *Id.* at 13:15-21. While Dr. Solomon noted a couple of N.N.’s responses on the  
18 incomplete sentences test that she interpreted as less than thoughtful or snarky (e.g., expressing a  
19 desire to leave Explorations and expressing regret at not turning off her cell phone tracker), Dr.  
20 Solomon was not able to say whether N.N. was faking her responses in any way during Dr.  
21 Nutter’s interview and testing process. *Id.* 33:12-34:10; 34:13-17.

22 As for Mr. Boudousquie, there is no dispute that Dr. Nutter did not interview him or obtain  
23 any information from him. Indeed, Dr. Nutter testified that she was not made aware that N.N.  
24 “had that type of therapeutic relationship at that time.” AR 1645:24-25; *see also* AR 1756:10-11  
25 (“I was not given information that she was being treated when I was assessing her.”). Neither side  
26 explains why Dr. Nutter did not have that information, and the record is unclear on that point.<sup>24</sup>

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27  
28 <sup>24</sup> Mr. Boudousquie could not recall clearly, but testified that he did not remember “being around”  
when Dr. Nutter conducted her assessment. *See* AR 1978:6-10.

1 Dr. Nutter had information indicating that N.N. previously had been diagnosed with Major  
2 Depressive Disorder, Recurrent, Severe without psychotic features, and Generalized Anxiety  
3 Disorder, and that during the prior academic year she had undergone treatment for those  
4 conditions. Plaintiffs' main point appears to be that Dr. Nutter's assessment is incomplete because  
5 it does not include Mr. Boudousquie's observation and opinion that N.N. had significant  
6 emotional issues at that time, even though she could and often did present herself to others as  
7 happy and social. *See* Dkt. No. 55 at 23. Here, plaintiffs point out that when asked at the due  
8 process hearing whether he believed N.N. was an accurate self-reporter of her own feelings, Mr.  
9 Boudousquie testified that he believed N.N. "was putting on a good face" because "she was  
10 wanting to try to get out of the program where she was at as quickly as possible, and she thought  
11 by putting on a good face that would happen." AR 1988:16-19; Dkt. No. 55 at 23.

12 What is not clear, however, is whether Mr. Boudousquie would have had that insight or  
13 information to provide at the time of Dr. Nutter's assessment. Dr. Nutter evaluated N.N. on  
14 August 24-25, 2018, when N.N. had been at Explorations for about three weeks. AR 337. Mr.  
15 Boudousquie testified to his impression that "N.N., when she came from [the Second Nature]  
16 Wilderness [program], was fairly positive on the outside." AR 1988:9-10. Mr. Boudousquie  
17 further agreed that N.N. "would not seem sad or depressed unless you were around her for . . . a  
18 little bit of time." AR 1990:8-10. It was only as he got to know N.N. that he observed symptoms  
19 of depression, which manifested in feelings of frustration and anger, and was not "always just  
20 moping around or whatever[.]" AR 1988:10-11, 1990:4-24, 1991:17-25, 1994:3-16. Ms. James,  
21 whom Dr. Nutter did interview, similarly testified that when N.N. had been at Explorations for  
22 about four or five weeks, Ms. James did not see N.N.'s depression because N.N. did not present  
23 herself with "sulky and down" behavior. AR 2196:18-24; 2197:8-11. Noting that she has "known  
24 N.N. for a long time now," Ms. James stated that it was only "over time" that N.N. "did manifest  
25 her depression, as many teenagers do, with low frustration tolerance. Sometimes high irritability,  
26 episodes of . . . anger that comes from that low frustration tolerance." AR 2197:15-19, 22. On  
27 this record, the Court is not persuaded that Dr. Nutter's failure to interview Mr. Boudousquie in  
28 August 2018 rendered her assessment incomplete because it did not include available information

1 about N.N.'s current emotional functioning.

2 The Court finds that the District did not procedurally violate the IDEA by providing an  
3 inadequate psychoeducational assessment.

4 **E. Whether the District Denied N.N. a FAPE by Failing to Identify Her as a  
5 Student Eligible for Special Education and Offering an IEP for the School  
Years 2018-2019 and 2019-2020**

6 For the 2018-2019 and 2019-2020 school years,<sup>25</sup> the ALJ denied relief on the ground that  
7 N.N. was not eligible for IDEA benefits because she was able to access the general education  
8 curriculum at TFHS without any special education supports. The ALJ focused on the two IEP  
9 meetings held during N.N.'s junior year on September 18, 2018 and May 16, 2019,<sup>26</sup> and  
10 concluded that N.N. did not prove that the District denied her a FAPE by failing to offer her an  
11 IEP. *See AR 1091-92, 1094.* He discounted Dr. Medina's psychological evaluation and Dr.  
12 Solomon's hearing testimony and concluded that "[t]he weight of the testimony supported Dr.  
13 Nutter's findings and conclusions that [N.N.] was not eligible for special education." AR 1093-  
14 94. Specifically, the ALJ noted that N.N.'s "ability to perform well at [TFHS] on a  
15 comprehensive public campus with no accommodations or supports was a significant factor in  
16 support of the [September 18, 2018 IEP] team's conclusion, along with her reacquisition of  
17 emotional stability and affect." AR 1091. He further explained:

18 [N.N.] provided evidence that she was doing well and making  
19 progress in Montana with the therapeutic program at Explorations,  
20 including tutoring and counseling combined with attendance at a  
21 public high school in a general education program. [N.N.] had also  
been provided with a 504 plan at [TFHS], providing  
accommodations similar to those provided in her [District] 504 plan  
from October 2017.

22 \*\*\*

23 [N.N.] contends that the after-school tutoring and study hall she  
24 received at Explorations, and the other individual and family  
counseling she received there, were necessary for her success at  
25 [TFHS]. However, [N.N.] failed to show that either tutoring or

26 <sup>25</sup> As noted above, the ALJ included in this part of his analysis his conclusions about whether the  
27 District denied N.N. a FAPE for the 2017-2018 school year. *See AR 1086, 1094.*

28 <sup>26</sup> The ALJ's decision indicates that the second IEP meeting occurred on May 14, 2019, but he  
appears to be referring to the date of the IEP meeting notice. *See AR 466, 1092, 1094.*

counseling were necessary for her to access her education at [TFHS], or that the tutoring or counseling was more than what was provided to general education students.

AR 1092, 1093-94.

The parties' primary point of contention is whether the therapy and other services N.N. received through Explorations were special education services necessary for her to access the general education curriculum at TFHS. Plaintiffs argue that the ALJ improperly focused on N.N.'s positive performance at TFHS, without considering the larger context in which her functioning was being assessed. They contend that N.N. was only able to succeed at TFHS because of her placement at Explorations and the services she received there. The District maintains that N.N. did not need special education and that the services she received at Explorations are "related services" that, standing alone, do not support IDEA eligibility.

Under the IDEA, a “child with a disability” means a child:

- (i) with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this chapter as “emotional disturbance”), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and
  - (ii) who, by reason, thereof, *needs special education and related services.*

20 U.S.C. § 1401(3)(A)(i), (ii) (emphasis added); *see also* 34 C.F.R. § 300.8(a)(1). Similarly, California law defines an “[i]ndividual[] with exceptional needs” as a person identified by an IEP team as “a child with a disability, as that phrase is defined in [20 U.S.C. § 1401(3)(A)],” with an impairment that “requires instruction and services which cannot be provided with modification of the regular school program in order to ensure that the individual is provided a free appropriate public education pursuant to [20 U.S.C. § 1401(9)].” Cal. Educ. Code § 56026(a), (b).

“Special education” is “‘specially designed instruction’ to meet the unique needs of a child with a disability,” *L.J.*, 850 F.3d at 1004 (quoting 34 C.F.R. § 300.39(a)(1)), and includes “instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings” and “instruction in physical education,” 20 U.S.C. § 1401(29). Regulations further

1 define “[s]pecially designed instruction” to mean:

2                   *adapting, as appropriate to the needs of an eligible child under this*  
 3                   *part, the content, methodology, or delivery of instruction—*

4                   (i) To address the unique needs of the child that result from the  
 5                   child’s disability; and

6                   (ii) To ensure access of the child to the general curriculum, so that  
 7                   the child can meet the educational standards within the jurisdiction  
 8                   of the public agency that apply to all children.

9                   34 C.F.R. § 300.39(b)(3) (emphasis added).

10                  “Related services” is defined by regulation to mean:

11                  transportation and such developmental, corrective, and other  
 12                  supportive services as are required to assist a child with a disability  
 13                  to benefit from special education, and includes speech-language  
 14                  pathology and audiology services, interpreting services,  
 15                  *psychological services*, physical and occupational therapy,  
 16                  recreation, including therapeutic recreation, early identification and  
 17                  assessment of disabilities in children, *counseling services*, including  
 18                  rehabilitation counseling, orientation and mobility services, and  
 19                  medical services for diagnostic or evaluation purposes. Related  
 20                  services also include school health services and school nurse  
 21                  services, social work services in schools, and parent counseling and  
 22                  training.

23                  34 C.F.R. § 300.34(a) (emphasis added); 20 U.S.C. § 1401(26). If a child has a listed disability,  
 24                  “but only needs a related service and not special education, the child is not a child with a  
 25                  disability” under the IDEA, unless “consistent with § 300.39(a)(2), the related service required by  
 26                  the child is considered special education rather than a related service under State standards[.]” 34  
 27                  C.F.R. § 300.8(a)(2)(i), (ii);<sup>27</sup> *see also McIntyre*, 976 F.3d at 914 (9th Cir. 2020) (concluding that  
 28                  exhaustion of claims under IDEA was not required where the accommodations plaintiff sought  
 29                  “cannot be construed as ‘special education,’ because they do not provide ‘specially designed  
 30                  instruction’” and were not “‘related services,’ which are services a child needs ‘to benefit from’  
 31                  special education.”); Robert A. Garda, Jr., *Untangling Eligibility Requirements under the*  
 32                  *Individuals with Disabilities Education Act*, 60 Mo. L. Rev. 441, 486-87 (2004) (footnotes

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27                  Section 300.39(a)(2) provides that “[s]pecial education” includes “[s]peech-language pathology  
 28                  services, or any other related service, if the service is considered special education rather than a  
 29                  related service under State standards,” as well as “travel training,” and “vocational education.”  
 30                  34 C.F.R. § 300.39(a)(2).

1 omitted) (“‘Special education’ is a term of art, with a limited meaning, and not all services  
2 provided by schools to disabled students are special education. A child with Attention Deficit  
3 Disorder (“ADD”) may need preferential seating and the use of a word processor, but not special  
4 education.”).

5 In California, “special education” is defined “in accordance with [20 U.S.C. § 1401(29)] to  
6 mean “specially designed instruction, at no cost to the parent, to meet the unique needs of  
7 individuals with exceptional needs, including instruction conducted in the classroom, in the home,  
8 in hospitals and institutions, and other settings, and instruction in physical education.” Cal. Educ.  
9 Code § 56031(a). Additionally, California law defines “designated instruction and services” to  
10 mean “‘related services’ as that term is defined in [20 U.S.C. § 1401(26) and 34 C.F.R.  
11 § 300.34].” *Id.* § 56363(a). The term “related services” means “transportation, and such  
12 developmental, corrective, and other supportive services . . . as may be required to assist an  
13 individual with exceptional needs to benefit from special education,” and includes “psychological  
14 services,” “counseling services,” “[i]nstruction in the home or hospital,” “[c]ounseling and  
15 guidance services, including rehabilitation counseling,” “[p]sychological services other than  
16 assessment and development of the individualized education program,” and “[p]arent counseling  
17 and training.” *Id.* § 56363(a), (b).

18 A student’s eligibility under the IDEA “should be assessed in terms of its appropriateness  
19 at the time of the child’s evaluation and not from the perspective of a later time with the benefit of  
20 hindsight.” *L.J.*, 850 F.3d at 1004 (citing *Adams*, 195 F.3d at 1149). When making this  
21 assessment, courts “employ what is termed the ‘snapshot’ rule that instructs the court to judge the  
22 appropriateness of the determination on the basis of the information reasonably available to the  
23 parties at the time of the IEP meeting.” *Id.* An eligibility decision is judged “on the basis of  
24 whether it took the relevant information into account, not on whether or not it worked.” *Id.*

25 **1. Disability**

26 Although the ALJ generally described three categories at issue for eligibility under the  
27 IDEA—emotional disturbance (“ED”), other health impairment (“OHI”) and specific learning  
28 disability (“SLD”)—he did not expressly address whether N.N. meets the criteria for a disability

1 under any of those three categories. *See* AR 1087-90. Plaintiffs argue that N.N. had conditions  
2 that met the criteria for ED, OHI and SLD; the District maintains that N.N. did not meet the  
3 criteria under any category. As discussed above, a student need only have a condition that  
4 satisfies one of the ED, OHI, or SLD categories.

5 The Court finds no serious dispute that N.N.’s conditions fall within at least the OHI and  
6 SLD categories. With respect to the OHI<sup>28</sup> category, Dr. Nutter acknowledged N.N.’s diagnoses  
7 of major depressive disorder and anxiety; noted that N.N. “exhibit[s] some weakness” with  
8 attention and underdeveloped executive functions; and stated that “[t]his constellation of emotion  
9 and neurocognitive weaknesses can impact [N.N.]’s alertness over time.” AR 352. As for the  
10 SLD<sup>29</sup> category, Dr. Nutter found that N.N. has an attention processing disorder and “a relative  
11 weakness in the area of reading,” with a significant discrepancy between her ability and  
12 achievement in reading comprehension. AR 353; *see also L.J.*, 850 F.3d at 1004 (concluding that

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13  
14 <sup>28</sup> An OHI is defined as:

15 having limited strength, vitality, or alertness, including a heightened  
16 alertness to environmental stimuli, that results in limited alertness  
17 with respect to the educational environment, that—

18 (i) Is due to chronic or acute health problems such as asthma, attention  
19 deficit disorder or attention deficit hyperactivity disorder, diabetes,  
epilepsy, a heart condition, hemophilia, lead poisoning, leukemia,  
nephritis, rheumatic fever, sickle cell anemia, and Tourette syndrome;  
and

20 (ii) Adversely affects a child’s educational performance.

21 34 C.F.R. § 300.8(c)(9).

22 <sup>29</sup> An SLD is generally defined to mean:

23 a disorder in one or more of the basic psychological processes  
24 involved in understanding or in using language, spoken or written,  
25 that may manifest itself in the imperfect ability to listen, think, speak,  
read, write, spell, or to do mathematical calculations, including  
conditions such as perceptual disabilities, brain injury, minimal brain  
dysfunction, dyslexia, and developmental aphasia.

26 34 C.F.R. § 300.8(c)(10)(i). An SLD “does not include learning problems that are  
27 primarily the result of visual, hearing, or motor disabilities, of intellectual disability,  
of emotional disturbance, or of environmental, cultural, or economic disadvantage.”  
28 *Id.* § 300.8(c)(10)(ii).

1 student “has a “specific learning disability’ because he has exhibited a severe discrepancy  
2 between his intellectual ability and his achievement.”) (quoting 34 C.F.R. § 300.8(c)(10)).

3 As for the ED<sup>30</sup> category, the Court finds that the preponderance of the evidence  
4 demonstrates that N.N. also had conditions that fall within this category. Dr. Nutter recognized  
5 that N.N. “has a history of experiencing a general pervasive mood of unhappiness or depression”  
6 and that N.N. had experienced depressive symptoms since at least May 2017. AR 339, 352. By  
7 that time, N.N. had “episodes of extreme sadness and thoughts of suicide” and used marijuana and  
8 alcohol to dull those feelings. *See* AR 339. Although Dr. Nutter found that N.N. experienced “a  
9 change in her mood” at the end of May 2018 (AR 352) and did not present as unhappy or  
10 depressed at the time of her assessment, other evidence in the record indicates that N.N. remained  
11 in an emotionally fragile state. In particular, at the time of N.N.’s August 2018 discharge from  
12 Second Nature, Dr. Schueler noted that while N.N. had made progress at the program, Dr.  
13 Schueler remained concerned about N.N.’s risk of relapse regarding depressive symptoms, defiant  
14 behaviors, and substance abuse. AR 315.

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17<sup>30</sup> An ED is defined as:

18 a condition exhibiting one or more of the following characteristics  
19 over a long period of time and to a marked degree that adversely  
affects a child’s educational performance:

- 20 (A) An inability to learn that cannot be explained by intellectual,  
sensory, or health factors.
- 21 (B) An inability to build or maintain satisfactory interpersonal  
relationships with peers and teachers.
- 22 (C) Inappropriate types of behavior or feelings under normal  
circumstances.
- 23 (D) A general pervasive mood of unhappiness or depression.
- 24 (E) A tendency to develop physical symptoms or fears associated with  
personal or school problems

25  
26 34 C.F.R. § 300.8(c)(4)(i). ED includes schizophrenia, but “does not apply to children who are  
27 socially maladjusted, unless it is determined that they have an emotional disturbance under  
28 paragraph (c)(4)(i) of this section.” *Id.* § 300.8(c)(4)(ii).

1                   **2.         Need for special education and related services**

2                 Having a disability under 20 U.S.C. § 1401(3)(A)(ii) that impacts educational performance  
3         is necessary, but not sufficient to establish IDEA eligibility. As noted above, a “child with a  
4         disability” is someone who, by reason of such disability, “needs special education and related  
5         services.” 20 U.S.C. § 1401(3)(A)(ii). Plaintiffs do not appear to dispute that a need for related  
6         services, alone, does not provide a basis for IDEA eligibility. *See* 34 C.F.R. § 300.8(a)(2)(i); Dkt.  
7         No. 61 at 12-13. The primary point of contention is whether the services N.N. received at  
8         Explorations constitute special education necessary for N.N. to access her education at TFHS, or  
9         whether they only were related services. *See* 34 C.F.R. § 300.104 (providing that “placement in a  
10       public or private residential program” is required if “necessary to provide special education and  
11       related services to a child with a disability[.]”).

12                 Relying on *L.J. v. Pittsburgh Unified Sch. Dist.*, 850 F.3d 996 (9th Cir. 2017), plaintiffs  
13         argue that the services N.N. received at Explorations constitute special education. In *L.J.*, the  
14         district court found that L.J. was disabled under three categories defined by the IDEA, but  
15         nonetheless concluded that he was not eligible for special education because of his satisfactory  
16         performance in general education classes. *Id.* at 999. The Ninth Circuit reversed, finding that the  
17         school “had already been providing L.J. with special services, including counseling, one-on-one  
18         assistance, and instructional accommodations” that “were in fact special education services  
19         tailored to L.J.’s situation.” *Id.* at 999, 1005. In reaching that conclusion, the Ninth Circuit  
20         distinguished between general education, which “is provided to non-disabled children in the  
21         classroom,” and special education, which “is ‘specially designed instruction’ to meet the unique  
22         needs of a child with a disability.” *Id.* at 1004 (quoting 34 C.F.R. § 300.39(a)(1)). Many of the  
23         services the school provided to L.J. were not available to general education students—including  
24         one-on-one assistance from a paraeducator specially trained to work with special education  
25         students; group, individual and family therapy; educationally-related mental health assessments  
26         (which the school admitted were offered only to special education students); and extensive clinical  
27         interventions by a school behavior specialist who designed a 9-hour training session for L.J.’s  
28         paraeducator, as well as specific study plans that “adapt[ed] the method and delivery of L.J.’s

1 instruction, and strategies to promote a structured environment and reinforce positive behavior.”  
2 *Id.* at 1005.

3 Plaintiffs argue that like L.J., N.N. received “specially-designed services at Explorations,”  
4 including “academic instructional support, executive functioning skills, and individual, group, and  
5 family counseling services.” Dkt. No. 55 at 17. Specifically, plaintiffs argue that Ms. Johnston  
6 provided what, they contend, is special education tailored to N.N.’s unique needs. *See id.*  
7 Plaintiffs broadly contend that all the “mental health services N.N. received at Second Nature and  
8 Explorations, were specially-designed for her, provided by qualified professionals, and necessary  
9 to receive educational benefit.” Dkt. No. 55 at 18. However, they acknowledge that the  
10 individual and group therapy N.N. received at Explorations are “related services.” *Id.* The  
11 question, then, is whether Ms. Johnston’s support services constitute “special education.”

12 As noted above, “special education” is “[s]pecially designed *instruction*” that “adapt[s], as  
13 appropriate to the needs of an eligible child under this part, the *content, methodology, or delivery*  
14 of *instruction*[.]” 34 C.F.R. § 300.39(b)(3) (emphasis added). Ms. Johnston supervised the  
15 Explorations study hall, provided after-school tutoring, helped N.N. create weekly study plans and  
16 yearly academic goals, and assisted N.N. with reading and with editing her written work. Much of  
17 what she did consisted of making sure that N.N. organized and used her time wisely, and plaintiffs  
18 contend that Ms. Johnston’s support assisted N.N. with executive functioning skills necessary for  
19 N.N. to be successful in school. However, unlike *L.J.*, nothing in the record suggests that Ms.  
20 Johnston provided instruction that adapted the content, methodology, or delivery of N.N.’s general  
21 education curriculum.

22 For example, Ms. Johnston’s weekly reports indicate that in supervising the Explorations  
23 study hall, she primarily monitored whether N.N. fulfilled her requisite study hall hours, used her  
24 study time productively, and kept up with her schoolwork. *See AR 399-429.* If N.N. fell behind  
25 on her schoolwork, she was required to spend additional time in study hall until she got caught up.  
26 *See, e.g.*, AR 401. Similarly, N.N.’s weekly study plans during her junior year included goals  
27 such as “Study for Chem final and finish English 2 semester 1 work”, with associated tasks  
28 “1) Finish daily homework first, 2) Quizlets for Chem final, 3) ConnectED practices for Chem and

1       4) Work on English 2 paragraph by paragraph,” and goals of “Daily homework, English Final  
2       Essay, Study for tests,” with associated tasks “1) Work on homework first, 2) 15-20 minutes  
3       studying for tests daily, 3) Write English essay and 4) Review essay.” AR 405, 406. Other study  
4       plans during N.N.’s senior year note goals of “Stay up to date with all schoolwork and to be  
5       prepared for any quiz/tests,” with associated tasks “1. Study 30-40 min. for math test, 2. Complete  
6       any HW [homework], 3. Get a start on college looking, 4. Sleep by 10 pm daily” (AR 424), as  
7       well as goals of “Turn in any late/missing work and prep for college,” with associated tasks  
8       “1. Finish & turn in late math homework, 2. Finish up Beowulf Rough draft, 3. Sign up for ACT  
9       [American College Test], 4. Sign up for FAFSA [Free Application for Federal Student Aid]”  
10      (AR 425).

11           Ms. Johnston did note reading and writing as specific areas of weakness for N.N. *See*  
12          AR 474. While Ms. Johnston contacted N.N.’s English teacher to check on N.N.’s progress  
13          (AR 1916:3-8, 10-13; 1917:3-7, 8-15, 21-24; 1918:20-1919:3), there is no indication that Ms.  
14          Johnston or anyone else provided instruction to N.N. that adapted the content, methodology, or  
15          delivery of instruction in that class. Aside from working with N.N. on her weekly study plans,  
16          Ms. Johnston set a goal for N.N. to read four books on subjects of interest to N.N. AR 474;  
17          1913:9-14. She also helped N.N. edit her school essays by providing comments to N.N., who  
18          received the comments and edited her work independently. AR 1918:5-13.

19           Nothing in Ms. Johnston’s testimony suggests that the support she provided constituted  
20           “[s]pecially designed instruction.” 34 C.F.R. § 300.39(b)(3). The Court agrees with the District  
21          that the support Ms. Johnston provided to N.N. resembles the kind of support a parent provides for  
22          a child at home. Indeed, in distinguishing the support she provided at Explorations and the  
23          support that a parent might provide at home, Ms. Johnston noted only that she could provide a  
24          structured study environment with a level of professional detachment that parents may not be able  
25          to provide due to time or financial constraints or because of strained relationships with their  
26          children. AR 2055:16-2056:18; 2059:25-2060:2; 2061:8-25. Additionally, Ms. Johnston did not  
27          refer N.N. for special education because N.N. had a 504 plan at TFHS that Ms. Johnston believed  
28          was sufficient. AR 1948:16-22. Plaintiffs point out that Ms. Hardy testified that executive

functioning instruction could be special education if it is provided by a special education teacher and is “uniquely adapted to the learning profile of that one student.” AR 2405:10-20. They further argue that Ms. Johnston’s support falls within Dr. Nutter’s own description of an “intervention.” Here, they note that Dr. Nutter generally agreed that an “intervention” could address executive functioning needs, and is “something that is not provided to the general class or the general group . . . something specialized and specific with a determined goal that is linked to an identified deficit.” AR 1737:5-10. However, Dr. Nutter also testified that an “intervention” requires “an instructional component.” AR 1739:23. Here, Ms. Johnston’s weekly reports reflect that she assisted N.N. after school in keeping track of her assignments, organizing her approach to homework and other tasks, studying every school night in study hall, encouraging her to read more, and providing comments for N.N. to use in independently editing her written work.

For the reasons discussed above, plaintiffs have not demonstrated that Ms. Johnston’s support services constitute “[s]pecially designed instruction” as defined by 34 C.F.R. § 300.39(a)(1).

Plaintiffs nonetheless maintain that in finding in favor of the District, the ALJ focused too narrowly on N.N.’s academic success at TFHS and Dr. Nutter’s observations and test results suggesting that N.N. was no longer sad or depressed, and failed to consider the broader context of N.N.’s mental health issues and treatment. Plaintiffs argue that notwithstanding N.N.’s positive performance at TFHS, consideration should have been given to the opinions and reports of Dr. Schueler, Mr. Boudousquie, Dr. Medina, and Dr. Solomon, and greater weight assigned to their testimony and opinions than to Dr. Nutter’s opinion that N.N. was not eligible for special education. Here, plaintiffs point out that Dr. Schueler expressed concern about N.N.’s risk of relapse following her discharge from Second Nature and recommended placement in a residential program. AR 313, 315. Additionally, they note Mr. Boudousquie’s testimony that N.N. masked her symptoms, which he observed only after spending some time with her. AR 1988:9-11; 1990:8-10, 20-24. N.N.’s ongoing mental health needs, plaintiffs contend, are further substantiated by Dr. Medina’s February 2019 report, which documents Dr. Medina’s diagnoses, including ADHD, Persistent Depressive Disorder (Dysthymia), a Parent-Child Relational Problem,

1 with a need to rule out Mixed Expressive-Receptive Language Disorder or Language Processing  
2 Disorder; and a Specific Learning Disorder with Impairment in Mathematics. AR 453. Finally,  
3 plaintiffs note that Dr. Medina's opinion regarding N.N.'s mental health impairments are  
4 supported by Dr. Solomon, who testified that serious symptoms of depression and anxiety do not  
5 simply resolve, and that as of September 2018 N.N. was "on the route to recovery," but could not  
6 be expected to have internalized new habits and coping skills. Dkt. No. 57 at 54:2-19. All of this  
7 evidence, plaintiffs argue, demonstrates that as of the September 18, 2018 IEP meeting and even  
8 as of Dr. Medina's February 2019 assessment, N.N. continued to experience a general pervasive  
9 mood of unhappiness or depression to a marked degree. *See* Dkt. No. 55 at 21; Dkt. No. 61 at 14-  
10 15.

11 The purpose of Dr. Nutter's psychoeducational assessment, however, was not merely to  
12 ascertain whether N.N. had a mental disorder or impairment, but to determine whether she had a  
13 disability as defined by the IDEA "*and* by reason thereof, need[ed] special education and related  
14 services." 20 U.S.C. § 1401(3)(A)(i), (ii); *see also* Dkt. No. 57 at 62:5-63:11. There is no  
15 contention that Dr. Nutter was not qualified to do so. As described by Dr. Schueler, Second  
16 Nature focuses on clinical, rather than educational, support. *See* AR 313 ("Second Nature is a  
17 licensed adolescent treatment program that utilizes the experiential opportunities of a wilderness  
18 setting with a clinically focused intervention."). As noted above, although N.N. apparently earned  
19 several school credits while at Second Nature (AR 1025, 2445:25-2446:5), there is no evidence  
20 indicating what educational services, if any, N.N. received while she was at that program.  
21 Similarly, Mr. Boudousquie generally did not deal with matters concerning N.N.'s academic  
22 performance. AR 1993:4-9, 16-22; 2006:23-2007:17. Without deferring to the ALJ's findings,  
23 the Court finds no error in his decision to discount the weight given to Dr. Medina's report, given  
24 the lack of educational context in her report and lack of evidence regarding Dr. Medina's  
25 experience in education or evaluating a student for IDEA eligibility. *See* AR 434-59; 2368:13-  
26 2369:1. While Dr. Solomon testified at the July 2021 evidentiary hearing to her experience in  
27 performing independent psychoeducational evaluations, she had not assessed N.N. In fact, as of  
28 the administrative hearing, Dr. Solomon had not spoken with T.T. or anyone who served N.N.

1 AR 2339:8-17.<sup>31</sup>

2 Plaintiffs' reliance on an OAH decision, *Parent v. Santa Monica-Malibu Unified Sch. Dist.*  
3 ("Santa Monica"), OAH Case No. 2018050306 (Nov. 30, 2018), is misplaced. In *Santa Monica*,  
4 the ALJ concluded that the school denied the student a FAPE and rejected the school's contention  
5 that school-based counseling, as opposed to placement in a residential treatment facility, would  
6 have been sufficient to meet the student's needs. The ALJ explained that the school narrowly  
7 focused on "certain test scores and interviews to determine Student's mental health issues were not  
8 significant, rather than consider the entire picture of what was happening to Student," and  
9 "discounted or ignored Student's behaviors across domains," including her limited academic  
10 progress and risky and inappropriate behaviors in other facilities and settings. Dkt. No. 56-1  
11 (Plaintiff's Request for Judicial Notice, Ex. 1 at 57, 60). In particular, the ALJ noted that "[f]or  
12 [the] most part, Student was not attending public school," and "was in a residential setting where  
13 her academics and behaviors were subject to a controlled environment, and she was receiving  
14 intensive individual, group, and family therapy provided by a clinical therapist, not a school  
15 psychologist." *Id.* at 58, 60.

16 Here, by contrast, N.N. received a regular education at TFHS; Explorations did not provide  
17 or control her academic instruction. While N.N. also received services at Explorations, for the  
18 reasons discussed above, plaintiffs have not established that those services constitute special  
19 education, such that N.N. is eligible as a "child with a disability" under the IDEA. *See generally*  
20 *D.A. v. Meridian Joint Sch. Dist.* No. 2, No. 1:12-cv-00426-CWD, 2014 WL 43639, at \*13-15 (D.  
21 Idaho Jan. 6, 2014) (concluding that student with high-functioning autism did not need special  
22 education to benefit from his education where his condition "appears to necessitate related  
23 services far more than it does special education."); *R.C. v. York Sch. Dep't*, No. 07-177-P-S, 2008  
24 WL 4427194 (D. Me. Sept. 25, 2008) (concluding that student was not eligible under the IDEA,  
25 where student succeeded in school despite serious mental health issues, including major

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27 

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<sup>31</sup> At the July 2021 evidentiary hearing, Dr. Solomon stated that she interviewed N.N. over the  
28 phone shortly after the administrative hearing. That interview was outside the permissible scope  
of Dr. Solomon's supplemental testimony. *See* Dkt. No. 57 at 11-12.

1 depression, requiring treatment), *report and recommendation adopted* 2008 WL 5135239 (D. Me.  
2 Dec. 5, 2008).

3 Accordingly, plaintiffs have not met their burden to show that the District denied N.N. a  
4 FAPE by failing to identify her as a student eligible for special education and offering an IEP for  
5 the school years 2018-2019 and 2019-2020.

6 **F. Whether T.T. is Entitled to Reimbursement**

7 Plaintiffs seek reimbursement of costs, subject to proof, for (1) private mental health  
8 services provided by CHC in the amount of \$3,000; (2) Dr. Medina's psychological evaluation in  
9 the amount of \$4,662; (3) placement at Second Nature in the amount of \$46,309.52; (4) placement  
10 at Explorations in the amount of \$148,121.60; (5) transportation expenses related to N.N.'s  
11 placements and family therapy visits in the amount of \$10,922.98; and (6) an award of costs and  
12 reasonable attorneys' fees and expenses, subject to proof. Dkt. No. 55 at 25.

13 The IDEA authorizes courts to grant "such relief as the court determines is appropriate,"  
14 20 U.S.C. § 1415(i)(2)(C)(3), and "confers broad discretion on the court" to determine the  
15 appropriate remedy where a FAPE has not been provided. *Sch. Comm. of Town of Burlington,*  
16 *Mass. v. Dep't of Educ. of Mass.*, 471 U.S. 359, 369 (1985). "[E]quitable considerations are  
17 relevant in fashioning relief." *Id.* at 374. Parents who unilaterally change their child's placement  
18 during the pendency of review proceedings, without the consent of the school, do so at their own  
19 financial risk. *Florence Cnty. Sch. Dist. Four v. Carter*, 510 U.S. 7, 15 (1993). "They are entitled  
20 to reimbursement *only* if a federal court concludes both that the public placement violated IDEA  
21 and that the private school placement was proper under the [IDEA]." *Id.* "Courts fashioning  
22 discretionary equitable relief under IDEA must consider all relevant factors, including the  
23 appropriate and reasonable level of reimbursement that should be required." *Id.* at 16. "Total  
24 reimbursement will not be appropriate if the court determines that the cost of the private education  
25 was unreasonable." *Id.*

26 In their briefs, the parties addressed plaintiffs' request for reimbursement largely on the  
27 assumption that the ALJ's decision would be affirmed or reversed entirely, without accounting for  
28 the possibility that the Court might affirm his decision in part. Accordingly, the Court requires

1 further briefing on the issue of what remedy, if any, is appropriate in view of the Court's  
2 determination that the District denied N.N. a FAPE in the 2017-2018 school year by waiting too  
3 long to conduct an assessment, but did not deny N.N. a FAPE in the 2018-2019 and 2019-2020  
4 school years.

5 **VI. CONCLUSION**

6 Based on the foregoing, the ALJ's decision is affirmed in part and reversed in part. The  
7 Court defers its ruling on plaintiffs' request for reimbursement and for attorneys' fees and costs,  
8 pending further briefing, consistent with this order.

9 By **August 12, 2022**, the parties shall submit a proposed briefing schedule for briefing  
10 addressing what relief, if any, may be appropriate for the Court to award to plaintiffs. The further  
11 briefing shall not be used for any arguments for reconsideration. Unless otherwise ordered, there  
12 will be no further supplementation of the evidentiary record and the matter will be deemed  
13 submitted without oral argument upon the submission of the parties' respective supplemental  
14 briefs. The Court grants the parties' July 15, 2022 joint request to continue deadlines as follows:

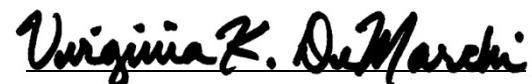
15 Last day for hearing on dispositive motions: March 21, 2023

16 Final Pretrial Conference: July 19, 2023, 10:00 a.m.

17 Jury Trial (6 days): August 2-4, 7-9, 2023, 9:00 a.m.

18 **IT IS SO ORDERED.**

19 Dated: August 4, 2022

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21   
22 VIRGINIA K. DEMARCHI  
23 United States Magistrate Judge  
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